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OCTOBER TERM, 1954

No. [redacted] 116

EDGAR B. STERN et al.
Petitioners

versus

THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT et al.
Respondents

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Petitioners, Edgar B. Stern, Robert E. Craig II, Charles Keller, Jr., Gervais Favrot and Leon Heymann, seek certiorari to review a judgment of the Supreme Court of Louisiana; and in support of their petition respectfully show:

OPINIONS BELOW

The original majority and dissenting opinions of the Supreme Court of Louisiana, the majority and dissenting opinions of the Supreme Court of Louisiana on denial of rehearing, and the opinion of the Civil District

Court for the Parish of Orleans (the court of first instance) are printed in Appendix A hereto. None of these opinions have been reported.

JURISDICTION

The decree of the Supreme Court of Louisiana was handed down on March 21, 1955. Rehearing was denied on April 25, 1955. Jurisdiction of this court, which lies under 28 USC 1257(3), is discussed at page 12 below.

QUESTION PRESENTED

The novel and important constitutional question at issue is:

> Does the Contracts Clause of the United States Constitution categorically prohibit reduction in any degree of the taxing power of a state governmental agency (respondent Levee Board) which has bonds issued and outstanding, even though the attempted reduction concededly leaves the agency with tax revenues, which, with the agency's other revenues, are sufficient to meet its obligations under the bonds and under all other antecedent contract obligations maturing in the year at issue?

By constitutional amendment decisively adopted at the polls, the people of Louisiana have sought to re-allocate available tax revenues by reducing the Levee Board's tax

power and concomitantly increasing the taxing power of the Orleans Parish School Board.[1]

The purpose of this re-allocation is to provide badly needed funds for continued operation of the public schools of New Orleans, without additional cost to the people.[2]

The Supreme Court of Louisiana, by its decree herein, has denied the right of the people to make this re-allocation, because of a supposed conflict with the provision of the United States Constitution which prohibits the States from impairing the obligation of contracts.

The question presented is novel in this court; but the decision below appears to be in clear conflict with the rationale of this court's decision in *Mobile vs Watson.*[3]

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[1] Both the Levee Board and the School Board operate within the Parish of Orleans, which is co-extensive with the City of New Orleans. A previous effort to increase the aggregate tax burden on property in New Orleans for the benefit of the School Board had been voted down in November, 1953.

[2] The President of the School Board has stated that, but for this reallocation, the current term of the public schools of New Orleans would have had to be curtailed by three weeks. See The (New Orleans) Times-Picayune, March 22, 1955, page 1. Repercussions of this court's ultimate decree in the Segregation Cases may well render the financial situation of the New Orleans schools even more critical. Over one million dollars of annual tax revenues are affected by the re-allocation. R 70; Exhibit D-9, printed in Appendix D at page 61 *infra*. Litigation contesting the School Board's right to these additional taxes will presumably be instituted if the decision below is left undisturbed.

[3] 116 US 289, 305 (1886). See footnote 1 on page 15 *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are

1—Article I, Section 10 of the United States Constitution;

2—Act 751 of 1954 of the Legislature of Louisiana, amending (when adopted at the polls) Article 12, Section 16 of the Constitution of Louisiana (Acts, State of Louisiana, Regular Session, 1954, page 1334);

3—Act 756 of 1954 of the Legislature of Louisiana, amending (when adopted at the polls) Article 16, Section 2 of the Constitution of Louisiana (Acts, State of Louisiana, Regular Session, 1954, page 1351);

4—Article 16, Section 2 of the Louisiana Constitution as it existed prior to amendment (Dart's Louisiana Constitution (1932), page 338); and

5—A resolution of respondent Levee Board, dated November 19, 1954 (unpublished).

These constitutional provisions and statutes are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Article 16, Section 2 of the Constitution of Louisiana originally empowered respondent Levee Board to levy a tax "not to exceed" 5 mills per taxable dollar, "for the purpose of constructing and maintaining levees, levee drainage and for all other purposes incidental thereto".

This provision constitutes the sole and entire authority for taxing by the Levee Board to raise general funds. Pursuant to this authority, the Board has issued bonds, to be met out of its revenues. No question of specific dedication of tax revenues to payment of bonds is involved in this case.[1]

In 1954, after sustained public controversy and agitation over the desperate need of the public schools of New Orleans for additional funds, the Legislature of Louisiana, to provide those funds without increasing the aggregate tax burden, recommended adoption of two constitutional amendments.[2]

One of these proposed amendments reduces the Levee Board's taxing power from 5 to 3-½ mills.[3] The other

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[1] The only tax revenues specifically dedicated to payment of Levee Board bonds are (a) a one-mill levy for retirement of a 1909 bond issue (see sections 1237 and 1238, Title 38 of the Louisiana Revised Statutes), which is well within the aggregate 3½-mill limit imposed by the constitutional amendment at issue; and (b) a special ½-mill tax for retirement of the so-called "Caernarvon" bonds (see Article 16A, Section 9 of the Louisiana Constitution), which the Levee Board undisputedly has the right to levy in addition to the 3½ mills permitted by the constitutional amendment at issue. R 60.

[2] R 162-63, 221-26.

[3] Act 756 of 1954, set forth in Appendix B hereto.

increases the taxing power of the Orleans Parish School Board by the 1-½ mills by which the Levee Board's power is reduced.[4]

Validity of each amendment was conditioned on adoption of the other. Section 3 of the Act (756) proposing the amendment to reduce the Levee Board's taxing power, directed that the amendment be submitted to the electorate on a ballot prescribing a choice between "FOR the proposed amendment . . . decreasing the tax millage of" the Levee Board, and "AGAINST the proposed amendment . . . decreasing the tax millage of" the Levee Board.

Both of the inter-related constitutional amendments were adopted by substantial majorities at the polls, on November 2, 1954.

Seventeen days later, the Levee Board adopted a resolution fixing its tax rate for raising general funds for 1955 at 5 mills, in plain contravention of the constitutional amendment reducing its taxing power to 3-½ mills.[5]

A taxpayer thereupon brought this action to enjoin the Levee Board from levying any tax in excess of 3-½ mills.

In its answer, the Board averred its duty to levy a tax at the rate of 5 mills as long as any of its outstanding bond

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[4] Act 751 of 1954, set forth in Appendix B hereto. See footnotes 1 and 2 on page 3 *supra*.

[5] An extra ½ mill was levied to defray a special bond issue. The Levee Board's power to levy this ½ mill is uncontested, and is not germane to this case. See footnote 1 on page 5 *supra*.

obligations remain unpaid; and pleaded that the constitutional amendment reducing its taxing power is violative of the Contracts Clause of the United States Constitution (Article I, Section 10).[6]

Petitioners, taxpayers, intervened in behalf of the plaintiff.[7] The President of the Levee Board intervened in behalf of the Board as a holder of its bonds.[8] No other bondholder intervened.

The trial court found as a fact that the Levee Board's revenues from its taxing power, as reduced by the constitutional amendment, when added to the Board's revenues from other sources, would be "more than adequate" to meet its obligations in 1955 under all outstanding bonds and other contracts antedating the effective date of the amendment, although insufficient to finance also some of the construction activities projected by the Board for 1955, for which contracts had not been let.[9]

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[6] R 10-12. Portions of the record and respondents' specifications of error in their briefs in the Supreme Court of Louisiana are printed in Appendix C hereto.

[7] Petitioners are members of the New Orleans Citizens' Financial Study Committee, which recommended proposal of the amendments at issue.

[8] The intervenor-bondholder likewise pleaded the Contracts Clause (R 18-19). His bonds had been purchased about a year before the trial, at a time when the Citizens' Financial Study Committee was studying legislative curtailment of taxes. R 213; Exhibits A, Hill 4 and 5.

[9] R 39-40, 184-87. The trial court found there would be a balance of $2,676,463 for the Board's construction activities and other operations (R 39). This finding was based on the Board's own budget for 1955 (Exhibit D-9, R 71, page 1 of which is printed in Appendix D hereto), which shows aggregate revenues of $6,400,792 (including $1,200,000 of mineral royalties), and fixed contract charges of $2,047,475. Exhibit D-11, R 102, also prepared by the

On this finding, the trial court upheld the constitutional amendment as against the contention that it violated the Contracts Clause; and issued a writ of injunction as prayed.

On appeal to the Supreme Court of Louisiana this judgment was reversed.[10] Two of the seven justices filed a dissenting opinion.

The majority opinion points out that "The first question posed is whether or not" the constitutional amendment at issue "impairs the obligation of the (Levee Board's) contract with the bondholders".[11]

Then, without questioning the correctness of the trial court's finding that the Levee Board's revenues, after reduction of its taxing power, would be sufficient to meet all antecedent obligations maturing in 1955, the majority opinion holds squarely that under the Contracts Clause,

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Levee Board, shows other unpaid antecedent contract charges amounting to $1,676,854. Petitioners acknowledge that, in any year in which the Board's revenues should be insufficient to meet its bond obligations, the bondholders could compel exercise of the Board's taxing powers up to the maximum extent authorized when the bonds were issued. See *State vs New Orleans*, 37 La.Ann. 13 (1885), and the *proviso* in the constitutional amendment at issue.

[10] Respondents' plea based on the Contracts Clause, was preserved on appeal by specifications of error in their briefs, as provided by the Rules of the Supreme Court of Louisiana. See Appendix C.

[11] What was considered an alternative contention by petitioners—that regardless of validity of the reduction in the Board's taxing power, the 5-mill levy should be reduced judicially as excessive and unnecessary for the proper discharge of the Board's functions—was rejected by the Supreme Court of Louisiana as beyond its powers, and has passed out of the case.

the outstanding bonds may not in any "degree . . . be diminished by curtailing the taxing power of the board as long as these bonds are outstanding and unpaid".

Finally, for the stated purpose of giving "the amendment a constitutional effect rather than to annul it", the majority opinion proceeds to "construe" the amendment by holding that it was not intended to limit the taxing power of the Levee Board at all as long as any of its bonds remain outstanding.

The majority opinion bottoms this curious interpretation on the theory that "The provision limiting the taxing power of the Levee Board 'for the purpose of constructing and maintaining levees, levee drainage and for all other purposes incidental thereto' merely limits the taxing power for that purpose and has no reference to outstanding obligations and bonds issued prior to the adoption of this amendment".

The dissenting opinion points out the intrinsic illogic of construing the constitutional amendment to be anything other than an intended absolute limit on the Board's taxing power for all purposes, in light both of the sweeping vote by the electorate " 'FOR the proposed amendment . . . *decreasing the tax millage of*' " the Board, and of the provision conditioning effectiveness of the amendment increasing the School Board's taxing power on adoption of the amendment reducing the Levee Board's taxing power.

The dissent goes on to show that since the Levee Board derives its entire taxing power, for meeting its outstanding bond obligations and for all other purposes,

from its constitutional authority to levy taxes "'for the purpose of constructing and maintaining levees, levee drainage *and for all other purposes incidental thereto*'", the restriction of the taxing power for the quoted purposes was necessarily intended to operate as a limitation of the Board's power to levy taxes for all purposes, including that of paying its outstanding bond obligations.

Then—emphasizing the undisturbed finding of the trial court that the reduction of the Board's taxing power leaves it with admitted revenues ample to meet its antecedent contract obligations in 1955—the dissent announces adherence to the principle, in direct contradiction to the majority opinion, that the Contracts Clause does not unqualifiedly forbid all impairments of the taxing power of an agency which has outstanding bond obligations, but that "the constitutional objections to legislation reducing the taxing power of a political subdivision obtain only in cases where the public body has been deprived of sufficient revenues or resources with which to pay its obligations according to their terms".

Application to the Supreme Court of Louisiana for a rehearing was denied; but four members of the majority of the court filed a concededly extraordinary opinion *per curiam* for the stated purpose of dispelling "the confusion that stems from the many erroneous statements that have been given widespread publicity".[12]

The opinion *per curiam*, expressly affirming "the correctness of our (original) opinion", demonstrates that the Levee Board's revenues for 1955 from its reduced taxing power alone would be insufficient to meet its antecedent

[12] The fifth member of the majority did not sign the opinion *per curiam* but merely concurred in the denial of rehearing.

contract obligations maturing in that year; but the majority of the court again leave undisturbed the trial court's finding that the Board's aggregate revenues for 1955 would not only meet all antecedent contract obligations due that year, but would leave a substantial surplus for the Board's other operations.[13]

The two dissenting justices both dissented from the denial of rehearing. In a written opinion one of them points out that "the attempt in the *per curiam* opinion to justify the levy of a 5½-mill tax, notwithstanding the clear import of the constitutional amendment limiting the tax for the year 1955 to 3½ mills, evidences that the underlying premise of the Court's thinking is that, to deny to the Levee Board the prerogative of setting up a budget of expenditures exceeding the proceeds of a 3½-mill tax, will necessarily impair the obligation of its contract with the bondholders".

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[13] The opinion *per curiam* points out that the Board's revenues from its reduced taxing power alone ($2,403,792) would be insufficient to meet its outstanding antecedent contract obligations of $3,724,329 (bond interest: $198,475, misstated in the opinion as $194,475; bond maturities: $924,000; "Dock Board" contract: $925,000; other contract obligations: $1,676,854). The opinion also states that the Board's aggregate revenues, which include $1,200,000 of mineral royalties, would leave an operating deficit of $2,214,037 when compared with the Board's antecedent contract obligations *plus* the total cost of all of the Board's projected new activities for 1955 amounting to $4,890,500 (proposed new construction: $3,705,500, misstated in the opinion as $3,705,000; operating charges: $1,185,000). The only combination of statistics that the opinion omits to present is that the Board's aggregate revenues for 1955 of $6,400,792, after reduction of its taxing power, are exactly $2,676,463 more than the Board's aggregate antecedent outstanding contract obligations for 1955 ($3,724,329). See footnote 9 on page 7 *supra*. Respondents themselves have never questioned the accuracy of the trial court's finding that the reduction to 3½ mills did not, in fact, impair the ability of the Levee Board to meet its antecedent contract obligations. Copies of respondents' briefs on appeal have been certified as part of the record in this court.

ARGUMENT [1]

I

Jurisdiction to Grant the Writ

Since the ultimate holding of the original majority opinion of the Supreme Court of Louisiana is ostensibly a "construction" of the constitutional amendment involved, the initial inquiry is whether this court has jurisdiction to hear this case.

As stated above, this ostensible holding is that a constitutional amendment explicitly reducing the Levee Board's taxing power "for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto", was not intended to reduce the Board's taxing power while its bonds are outstanding; despite the fact that the Board's only general taxing power derives from its power to levy taxes for the quoted purposes, and that the amendment was adopted by the people at large through a convincing vote "FOR the proposed amendment . . . decreasing the tax millage of" the Board.

As also heretofore pointed out, the original majority opinion below declares frankly that the question posed

[1] No contention of mootness is anticipated. During the closing months of this year the Levee Board will presumably collect additional taxes for 1955. Petitioners, however, will pay the tax under protest; and the final judgment in this case will be *res judicata* as to their right to a refund. Pending efforts in the Louisiana Legislature to enact a new amendment to reduce the Levee Board's tax power, do not affect the propriety of allowance of certiorari herein. A new amendment would be open to attack by bondholders on the same theories that prevailed below.

in this case is whether or not the constitutional amendment "impairs the obligation of the contract with the bondholders". The square preliminary holding of the original majority opinion is that, under the federal Contracts Clause, the Board's outstanding bonds may not "be diminished by curtailing the taxing power of the board" in any degree, "as long as these bonds are outstanding and unpaid". And the candidly avowed purpose of the holding as to construction of the constitutional amendment is to give "the amendment a constitutional effect rather than to annul it".

It appears clearly from both the *per curiam* and the dissenting opinion on denial of rehearing, that the matter decided by the Supreme Court of Louisiana in this case is not a mere question of the proper interpretation of the constitutional amendment, but is the fundamental issue whether or not the amendment violates the Contracts Clause.

In light of these circumstances, of the essential unreason of the holding as to interpretation—unreason irrefutably demonstrated by the original dissenting opinion —and of the forthright abandonment of all discussion of interpretation in the opinion *per curiam* on denial of rehearing, it is evident that the original majority opinion, while professing to construe the amendment in constitutional terms, in fact annuls it outright as violative of the Contracts Clause.

The subtlety of the invalidation amounts at most to avoidance of the federal constitutional question at issue,[2] a move unavailing to deprive this court of jurisdiction.[3]

Attention is invited particularly to *Terre Haute and Indianapolis Railroad Company vs Indiana,* in which this court did not hesitate to pierce the veil of an inherently unreasoned construction by a state court of a statutory charter, through which the state court sought to elude the federal constitutional question presented.

Mr. Justice Holmes commented, for a unanimous court, that "we are of the opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court".[4]

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[2] The passing mentions, in the majority opinions below, of the "impairment-of-contracts" clause of the Louisiana Constitution, appear to be in furtherance of the avoidance. The constitutional amendment under discussion would of course automatically repeal any pre-existing provision of the Louisiana Constitution, to the extent of any inconsistency between them.

[3] Review by this court cannot be frustrated by the action of a state court in seeking to place its decision on a non-federal ground "so certainly unfounded that it may properly be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question". *Enterprise Irrigation District vs Farmers Mutual Canal Co.,* 243 US 157, 164 (1917). Accord: *Lawrence vs State Tax Commission,* 286 US 276, 282 (1932); *Ward vs Board of County Commissioners,* 253 US 17, 22 (1920).

[4] 194 US 579, 589 (1904). See also *Lovell vs City of Griffin,* 303 US 444 (1938).

II

Reasons Relied on for Allowance of the Writ

The essential holding below—that under the Contracts Clause the taxing power of a state agency which has outstanding bonds can never be limited to any extent as long as any of the bonds are outstanding, even though the limitation would not in fact impair the agency's power to meet its obligations under the bonds—clearly raises a constitutional issue of great magnitude which has never been, but should be, squarely resolved.

Although this question is novel in this court, the decision below appears to be in sharp conflict with the rationale of this court's holding in *Mobile vs Watson*, that limitation of the taxing power is forbidden if no adequate means remain for payment of the bonds.[1]

Questions of the power of States generally to adapt their taxing systems to expanding spheres of governmental operation, and to the shifting emphasis of governmental needs, are of obvious importance.

In an economy characterized by tax burdens approaching the point of practical saturation, often the most, and in many cases the only, feasible means of adaptation is re-allotment of sources of revenue from agencies which need them less to agencies which need them more.

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[1] 116 US 289, 305 (1886). No court has heretofore held that impairment of obligation results from a change in tax structure unless the change in fact causes default in contractual fulfillment. The cases cited in the majority opinion below all involved actual impairment of ability to meet antecedent contract obligations.

Weighty considerations urge review of a judicial decision which, on supposed constitutional grounds, thwarts the effort of the people of a State to meet pressing fiscal wants through re-allotment of the tax revenues of a bond-issuing agency which has no need of them to pay its pre-existing debts.

The questions posed by such a decision, significant as they are in the abstract, become peculiarly crucial when efficient operation of the public schools of a great City [2] may depend on the right of the people so to limit the taxing power of an agency created by them many years in the past.[3]

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[2] The practical effect of the decision by the Supreme Court of Louisiana has already been adverted to in footnote 2 on page 3 *supra*. Some conception of the anxiety attendant on that decision may be gained by reference to the following editorials in all three of the New Orleans newspapers: "Public Will on Taxes Miscarries", in The Times-Picayune, March 22, 1955; "The Will of the People Recalled", in The New Orleans States, March 22, 1955; and "Morally Bound by People's Will", in The New Orleans Item, March 23, 1955.

[3] The Levee Board has itself conceded that "its principal function"— flood control, now primarily the responsibility of the federal government (see Senate Report 1143, 81st Congress, 1st Session, pages 49-50)—"has almost become lost in the myriad of seemingly unrelated responsibilities it has been called upon to bear". Pamphlet, "Building a Great City", Trial Exhibit Roussel 1.

It is respectfully submitted that allowance of certiorari is amply warranted by the gravity of the issues which inhere in this cause.

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APPENDIX A

Original Majority Opinion and Decree of the Supreme Court of Louisiana

PONDER, Justice.

The plaintiff, Vincent Dantoni, a property owner and taxpayer, brought suit against the Board of Levee Commissioners of the Orleans Levee District seeking to enjoin the defendant board from levying or attempting to levy any tax in excess of 3½ mills for the years beginning 1955 through 1959 and from levying or attempting to levy a tax in excess of 2 mills thereafter and to annul a resolution, adopted by the defendant board, to levy a tax of 5½ mills on all taxable property in the Parish of Orleans for 1955. Defendant answered admitting that the resolution was adopted and averred that under the provisions of the Constitution, and the legislation enacted thereunder, that it was authorized to levy the 5½ mill tax, ½ mill for the payment of Reparation claims arising out of the break of the levee at Caernarvon, and 5 mills for the carrying out of its duty to construct, maintain, and repair levees and to retire its bonded indebtedness. Louis J. Roussel, owner of various bonds issued by the board, intervened and alleged that the defendant board had $8,280,000.00 worth of outstanding bonds; that under the constitutional provisions in effect at the time the bonds were issued the defendant board was authorized to levy a tax of 5 mills on the dollar for the purpose of constructing and maintaining levees, levee drainage and for all other

purposes incidental thereto and to retire the bonds issued for that purpose; and that the constitutional amendment adopted pursuant to Act 756 of 1954 is unconstitutional because it impairs the contract of the bondholders. A petition of intervention was filed by several citizens and taxpayers who joined with the plaintiff and prayed for an injunction against the defendant board. After a hearing of the case, the lower court gave judgment annulling the resolution of the defendant board and enjoined the board from levying or attempting to levy any tax in excess of 3½ mills for the years 1955 through 1959 and from levying or attempting to levy any tax in excess of 2 mills thereafter. The defendant board and the intervenor Roussel have appealed.

This litigation raises two questions. The first question posed is whether or not Act 756 of 1954, adopted as a constitutional amendment to Section 2 of Article 16 of the Constitution of 1921, impairs the obligation of the contract with the bondholders. The plaintiff and intervening taxpayers contend that the taxing power of the Levee Board is limited to 3½ mills by the amendment. All parties concede that the Levee Board had authority to levee ½ mill of the tax for the payment of the reparation claims arising out of the break of the levee at Caernarvon. The intervening bondholder contends the amendment to the Constitution impairs the obligation of the contract with the bondholders. The Levee Board contends that the constitutional amendment merely restricts their taxing power as to levee work and does not restrict it insofar as the bondholders are concerned.

It appears from the evidence that there are $501,000.00 worth of bonds outstanding and unpaid issued in the year 1909. These bonds were issued prior to the adoption of the Constitution of 1921 and it is contended that under a prior act they were secured by only one mill tax. It is not necessary to determine this question for the purpose of the decision in this case because there are outstanding bonds in the amount of $7,214,000.00 issued under the provisions of Section 2 of Article 16 of the Constitution of 1921, prior to the 1954 amendment.

Under the provisions of Section 2 of Article 16 of the Constitution of 1921, prior to the adoption of the amendment of 1954, the Levee Board was authorized to levee annually a tax not to exceed 5 mills for the purpose of construction and maintaining levees, levee drainage and for all other purposes incidental thereto. The bonds were issued, prior to this amendment, for that purpose and they show on their face that the full faith and credit of the Levee Board was pledged for their payment. And in addition it is stated on the bonds that they were issued in pursuance to Acts 28 of the 3rd. Extra Session of 1934 and 29 of the 2nd Extra Session of 1935 and "in conformity with all the provisions of the laws and Constitution of the State of Louisiana applicable thereto." It is declared in both of these acts that these bonds have the qualities of negotiable paper under the law merchant. (Sections 7 and 6 respectively.) In Act 28 of the 3rd Extra Session of 1934, Section 2, it is provided that the bonds are secured in the same manner that the existing bonds, etc., are secured and in addition thereto they are further secured by the levying and collecting of any tax that the

"Board is authorized by law to levy". The bonds issued under Act 29 of the 2nd Extra Session of 1935 are not only secured by the taxing power of the Board but it is provided in Section 4 therein that if this taxing power is not sufficient to pay them that it shall be the duty of the State Treasurer to provide sufficient funds of the State, not otherwise appropriated, and that it is the duty of the Legislature to provide sufficient funds for that purpose.

Under the provisions of Section 10 of Article 1 of the Federal Constitution, no state can pass any law impairing the obligation of contracts. Under the provisions of Section 15 of Article 4 of our Constitution, no law can be passed impairing the obligation of contracts. It is a fundamental principle that laws existing at the time a contract is entered into are incorporated into and form a part of the contract as though expressly written therein. It is also well established that the value of a contract cannot be diminished by subsequent legislation. The impairment is not one of degree but any encroachment in any respect upon the obligation cannot be permitted. The value of the contract cannot be diminished by curtailing the taxing power of the board as long as these bonds are outstanding and unpaid. We are supported in these views by the following cases: *State ex rel. Moore v. City*, 32 La. Ann. 726; *State ex rel. De Leon v. City*, 34 La. Ann. 477; *State ex. rel. Carriere v. City*, 36 La. Ann. 687; *State ex rel. Marchand v. New Orleans*, 37 La. Ann. 13; *State ex rel. Thorn v. City of New Orleans*, 37 La. Ann. 528; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Louisiana ex. rel. Southern Bank v. Pilsbury*, 105 U. S. 278, 26 L. ed.

1090; *Nelson v. St. Martin*, 111 U. S. 720, 4 Sup. Ct. 648, 28 L. ed. 574; *Louisiana ex. rel. Hebert v. New Orleans*, 215 U. S. 170, 54 L. ed. 144, 34 Sup. Ct. 40; *Hicks v. Cleveland* (CCA 4th) 106 F. 459; *Rorick v. Board of Commissioners of Everglades Drainage District*, 57 F. 2d. 1048; *Bank of Minden v. Clement*, 256 U. S. 126, 41 Sup. Ct. 408, 65 L. ed. 857; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Perry v. Town of Samson*, 11 F. 2d. 655, affirmed 17 Fed. 1; *City of Ft. Madison v. Ft. Madison Water Co.*, 134 Fed. 214; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. 398.

The constitutional amendment adopted pursuant to Act 756 of 1954, amending Section 2 of Article 16 of the Constitution of 1921 does not limit the taxing power of the Levee Board for all purposes to 3½ mills. The amendment from its clear and unambiguous language cannot be so construed. The amendment reads as follows:

> "Section 2. For the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, the governing authority of each district, with the exception of the Board of Levee Commissioners of the Orleans Levee District, may levy annually a tax not to exceed five (5) mills on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, may levy annually for the years 1955, 1956, 1957, 1958 and 1959 a tax not to exceed three and one-half (3½), mills and annually there-

after a tax not to exceed two (2) mills, on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. Should the necessity arise in any levee district to raise additional funds for such purposes, the said tax may be increased when the rate of such increase and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property taxpayers of said district qualified to vote and voting at such election. Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred."

Since there is no ambiguity in the language used in this amendment, we must abide by the intent and purposes expressed therein. The provision limiting the taxing power of the Levee Board "for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto" merely limits the taxing power for that purpose and has no reference to outstanding obligations and bonds issued prior to the adoption of this amendment. This provision is prospective and relates to something to be done in the future. No reference is made therein to past obligations. The last provision in the amendment, viz: "Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred" is retrospective and relates to obligations incurred prior to the adoption of the amendment. It protects the rights already acquired by the bondholders. In other words, if the Levee Board is remiss in making provisions for the payment of the interest on the

bonds and the retirement of matured bonds, the bondholders could enforce the taxing power of 5 mills if necessary to meet these obligations. The amendment has a two fold purpose, the construction of levees, etc. and the payment of the Levee Board's outstanding obligations. It is the duty of the Levee Board to carry out these purposes. The interpretation we have placed on this amendment is consonant with the clear and unambiguous language used in the amendment and gives the amendment a constitutional effect rather than to annul it. It is well settled that a law should be construed so as to give it a constitutional effect if possible to do so.

It is suggested that the case of *Atchafalaya Levee District v. Lagarde*, 167 La. 612, 120 So. 25 and *Board of Levee Commissioners of the Orleans Levee District v. Whitney Bank*, 171 La. 28, 129 So. 658, are pertinent to a decision in this case. These cases are not applicable and involve entirely different factual situations. Moreover no bondholder was a party to the Atchafalaya suit and the question in the Whitney Bank case was whether any specific portion of the five mill tax could be dedicated to the exclusion of other uses of the taxing power. Therefore any statements made in those cases could not be controlling.

The second question posed is whether or not the defendant Board abused its discretion in preparing its budget. The action of the Board is not subject to review unless there has been some palpable abuse. *Moore v. City of New Orleans*, 32 La. Ann. 726; *Saloy v. City*, 33 La. Ann. 82; *Marchand v. City*, 37 La. Ann. 18; *State ex. rel. Bene-*

dict v. City of New Orleans, 111 La. 374, 35 So. 605; *State ex rel. Lorenz v. City Council of New Orleans,* 116 La. 851, 41 So. 115; *Gibson v. City of Baton Rouge,* 161 La. 637, 109 So. 339, 47 A.L.R. 1151; *Henderson v. City of Shreveport,* 160 La. 360, 107 So. 139; *Bullis v. Town of Jackson,* La. App., 4 So. 2d. 550; *Hines v. Guillot,* 153 La. 319, 95 So. 794; *Parker v. Mayor and City Council of Monroe,* 128 La. 951, 55 So. 587 (and numerous authorities cited therein); *Dickson v. Board of Commissioners of Caddo Levee District,* 210 La. 121, 26 So. 2d. 474; *Board of Commissioners of Tensas Basin Levee District v. Franklin,* 219 La. 859, 54 So. 2d. 125.

The attack on the budget seems to be leveled principally at the work proposed by the board. We find no evidence in the record that would justify us in saying that the items listed in the budget are not correct or that the work proposed was not necessary. The chief engineer of the Levee Board testified that the work proposed in the budget is necessary and there was no evidence offered to contradict him in this respect. We cannot substitute our judgment as to the feasibility of the work. *Dickson v. Board of Commissioners of Caddo Levee District, supra* and *Board of Commissioners of Tensas Levee District, supra.*

For the reasons assigned, the judgment of the lower court is reversed and set aside and the suit is hereby dismissed. One-half of the costs to be paid by the plaintiff Dantoni and the other half to be paid by the intervenors Edgar B. Stern, Sr., Robert E. Craig II, Charles Keller, Jr., Gervais Favrot and Leon Heymann.

Original Dissenting Opinion in the Supreme Court of Louisiana

McCALEB, J., Dissenting.

The gist of the majority opinion, as I read it, is that Act 756 of 1954, amending Section 2 of Article 16 of the Constitution, does not impair the obligation of the contract between the Board of Commissioners of the Orleans Levee District and its bondholders only because the constitutional amendment has not decreased the taxing power of the Levee District from 5½ to 3½ mills.

It is my opinion that the construction thus given not only disregards the reason and spirit of the law and the cause of its adoption but leads to the unseemly consequence that the people, by the passage of the amendment, actually vouchsafed to the Levee District three mills for the future construction and maintenance of its levees during 1955 and 2½ mills to service and liquidate its antecedent outstanding bonds. That the Legislature and the people never intended anything of this sort is clearly shown by the fact that this constitutional amendment was indispensably related to and connected with Act 751 of 1954, which authorized the Orleans Parish School Board to levy an additional 1½-mill tax, provided Act 756 was approved by the electors, and also by Section 3 of Act 756, which sets forth the words to be printed on the official ballot to be used at the election thus:

> "FOR the proposed amendment to Section 2 of Article XVI of the Constitution of 1921, *decreasing the tax millage* of the Board of Commissioners of the Orleans Levee District." (Emphasis mine.)

These words were followed by a similar provision for those persons who desired to vote against the decrease in millage.

Accordingly, it would seem plain that it was never the design of either the Legislature or the people that the Levee Board's taxing powers would be enhanced or even unaffected by the constitutional amendment. But the majority say that, since there is no ambiguity in the language employed in the amendment, there is therefore no room for interpretation and that the provision must be construed as written, that is, that it gives to the Levee Board power to levy taxes not to exceed 3½ mills for levee maintenance and construction during 1955 and also provides that the amendment shall not affect or impair the right of taxation to service and liquidate the antecedent bonds issued by the Board.

I cannot agree that the language used in the constitutional amendment supports this narrow interpretation. In the first place, in discerning what was intended by the provision that the annual tax levies of the Levee District throughout the State shall be for the purpose of constructing and maintaining levees "and for all other purposes incidental thereto", consideration must be given to the fact that Section 2 of Article 16 of the Constitution provides the only general taxing power which Levee Boards are authorized to exercise. Bonds which were issued prior to the adoption of the 1921 Constitution were of necessity required to be liquidated out of the 5-mill levy applicable at that time to all Boards, as there was no other taxing source from which such funds could be obtained.

Indeed, the language of the Constitution authorizing Levee Districts to assess a 5-mill tax is identical with that contained in the amendment reducing the tax millage of the Orleans Levee District to a maximum of 3½ mills. No one has heretofore contended that the language of the Constitution stating that the tax millage is to be used "for the purpose of constructing and maintaining levees, levee drainage, *and for all other purposes incidental thereto*" was so prospective in its purpose that the taxes collected from the levy were not attributable to the payment of the antecedent debts of the various Boards and particularly, in the case at bar, to the bonds issued in 1909, long prior to the adoption of Section 2 of Article 16 of the Constitution. It appears to me that payment of outstanding bonded indebtedness is a purpose incidental to the construction and maintenance of levees, as the very taxes which were funded into bonds (under authority of Section 3 of Article 16 of the Constitution) were dedicated for that purpose.

Nor can the proviso of the constitutional amendment be fairly construed as an absolute grant to the Orleans Levee District to levy additional taxes not to exceed 5½ mills. On the contrary, that proviso is simply a recognition by the people of the obligation of the antecedent contracts of the Board and assures the Board's creditors that, notwithstanding the reduction of the taxing power of the Orleans Levee District to 3½ mills, it would nevertheless be required to levy a tax not to exceed 5½ mills in the event the 3½ mill tax and other revenues at any time proved insufficient to service and liquidate its prior indebtedness. The evidence in this case, which the majori-

ty does not discuss, plainly exhibits, as found by the district judge, that the taxes which the Board will receive, based on 3½ mills for 1955, plus its other revenues, will not only be ample to pay all of the fixed charges and other outstanding contractual liability but will actually leave a balance of $2,676,463.00 on hand after such payment.

I am also of the opinion that the reduction in the power of taxation, which the people sought to effect by constitutional amendment, did not, in fact, impair the obligation of a contract as the President of the Levee Board, who intervened as a bondholder, contends. It is, of course, well recognized by the authorities cited in the majority opinion that the value of a contract cannot be diminished by subsequent legislation and that its impairment is not one of degree, but any encroachment upon the obligation must be avoided. However, the constitutional objections to legislation reducing the taxing power of a political subdivision obtain only in cases where the public body has been deprived of sufficient revenues or resources with which to pay its obligations according to their terms. For a comprehensive discussion of this matter see annotation 156 A.L.R. pages 1264-1280, also cases of *State ex rel Marchand vs. City of New Orleans*, 37 La. Ann. 13 and *Board of Com'rs. vs. C. Lagarde Co.*, 167 La. 612, 120 So. 25. The test, as stated by the Supreme Court of the United States in *Mobile vs. Watson*, 116 U.S. 289, 29 L. Ed. 620, 6 S. Ct. 398, is whether there has been an impairment *in fact* of the obligation, that is, if the law which limits the taxing power leaves no adequate means for the payment the bonds, it is then violative of the Federal Constitution.

It is manifest that this is a salutary rule of reason for, otherwise, the taxing power pledged to the payment of the antecedent debt would be compelled to be exerted to the utmost at all times irrespective of the amount of the revenue produced and the amount necessary to service or liquidate the obligation.

I respectfully dissent.

Hawthorne, J., dissents. I concur in the dissent of Justice McCaleb.

Opinion *Per Curiam* of the Supreme Court of Louisiana on Denial of Rehearing

In their application for rehearing the plaintiff and intervening taxpayers do not raise any questions but those fully considered and answered in the original opinion and in view of our conclusions and the correctness of our opinion we would ordinarily refuse the rehearing without a *per curiam* but in order to dispel the confusion that stems from the many erroneous statements that have been given widespread publicity we think a few factual observations are pertinent and necessary.

Counsel for the intervening taxpayers state in their brief: "The Court does not question the clear and abundantly supported finding of the lower court that a 3½ mill tax will not only be sufficient to discharge all antecedent bonds and other obligations of the Board maturing in 1955, but will afford a balance of over $2,600,000

for the Board's other operations." This statement is ridiculous because the facts as disclosed by the record show that the 3½ mills will produce only $2,403,792 whereas the outstanding obligations exceed this amount by $1,320,537. The interest on the bonds is $194,475; the principal of matured bonds is $924,000; the Dock Board contract calls for $925,000; and the obligations of the Board under other outstanding contracts now due and owing is $1,676,854. The foregoing outstanding obligations alone amount to $3,724,329 without including the operating expenses of the Board, the works necessary to maintain the levee system and the development of Lakeshore.

In the dissenting opinion, upon which much of the erroneous publicity given this case is based, and upon which counsel for appellees rely strongly it is stated that the evidence plainly exhibits, *as found by the district judge*, that the taxes which the Board will receive from the 3½ mills plus its other income is not only sufficient to pay all of the fixed charges and other outstanding obligations but will actually leave a balance of $2,676,463. It is apt to observe that the dissenting opinion is based solely on the district judge's conclusions. A mere perusal of the record shows that our learned brother below left out *all* of the operating expenses,[1] and necessary construction work, in other words he deleted the fixed charges of operation amounting to $1,185,000 and $3,705,000 for the necessary construction proposed in the budget or a total

[1] Employees' Retirement Fund—$40,000; Insurance (Fire, Compensation, Liability)—$30,000; Airport Expenditures—$90,000; New Equipment—$50,000; Materials & Supplies—$150,000; Payrolls—$775,000; Miscellaneous—$50,000.

of $4,890,500. The observation of the trial judge that the budget was "unrealistic" might be better applied to his conclusions rather than to the budget for nowhere in the record is found any basis or support for his conclusions which would not only leave the Board with an insufficient amount of money to pay its outstanding obligations but would leave it without funds to operate, maintain a levee system, and develop the Lakeshore area, from which most of its other revenue is derived, and would in effect abolish the Levee Board. It would leave the bondholders without the necessary machinery set up in the Constitution to collect and retire the bonds.

The proposed budget of the Levee Board shows that the 3½ mill tax together with all other revenue of the Board would leave a deficit of $537,183. At the time the budget was prepared $1,676,854 was due on other outstanding obligations which was inadvertently left out of the budget, when this amount is added to the deficit it would leave an actual deficit of $2,214,037. In fact the 5 mill tax with the other revenues of the Levee Board is not sufficient to cover the proposed expenditures and will leave a deficit of $1,173,432. These facts clearly show the fallacy of the erroneous statement that the 3½ mill tax with the other revenues of the Board would produce a surplus.

The Levee Board produced competent testimony and various instruments to prove and establish the correctness of every item in the budget and the necessity of the work proposed therein. No evidence and not a single witness was produced to contradict the evidence and

testimony presented by the Levee Board, consequently there is no room left for any speculation regarding this matter. Courts cannot substitute their personal opinion, not based on evidence and disregard the evidence contained in the record. As pointed out in our original opinion the action of the Board is not subject to review unless there has been some palpable abuse. In the absence of any evidence to this effect we are not warranted in disturbing the discretion placed in the Board by the Constitution and laws of this State.

Another of the many erroneous contentions receiving widespread publicity is expressed in the brief of counsel for the intervening taxpayers that the effect of our original opinion is the authorization of the Board to assess annually a total of 8½ mills. We merely held that the taxing power of the Levee Board was restricted insofar as levee work was concerned but the 5 mill taxing power was not curtailed insofar as the rights acquired by holders of bonds or other obligations may thereby be affected. The provision that the amendment *shall not affect or impair the rights already acquired by holders of bonds or other obligations of the Board already issued or incurred,* undoubtedly refers to the taxing power of the Board at the time the bonds were issued or the obligations incurred and is designed to protect those rights, in other words, the rights acquired under a 5 mill taxing power.

It is obvious to us that those who were responsible for drafting the constitutional amendment were fully aware of the Federal and State constitutional provisions forbidding

the impairment of obligations and expected the result we have reached. The fact that the people may have been induced to vote for the amendment because of the wording of the proposal is a matter over which we have no control under our triumvirate system of government.

The applications for a rehearing are refused.

Hamiter, J., concurs in the refusal of a rehearing.

Dissenting Opinion in the Supreme Court of Louisiana on Denial of Rehearing

McCALEB, J., Dissenting.

I dissent from the refusal of a rehearing in this case. Furthermore, I remain of the opinion that the trial judge has correctly appraised the facts with respect to the obligations of the Levee Board, its financial structure and condition. It appears to me that the attempt in the *per curiam* to justify the levy of a 5½-mill tax, notwithstanding the clear import of the constitutional amendment limiting the tax for the year 1955 to 3½ mills, evidences that the underlying premise of the Court's thinking is that, to deny to the Levee Board the prerogative of setting up a budget of expenditures not exceeding the proceeds of a 3½-mill tax, will necessarily impair the obligation of its contract with the bondholders.

If, as the majority say in the original opinion and repeat in the *per curiam*, the constitutional amendment voted by the people did not reduce the Board's power of taxa-

tion to 3½ mills for 1955, then the matter of the Board's expenditures is of no moment at all. Therefore, since the majority see fit to enter into a discussion calculated to justify the expenditures of the Board for 1955, it would seem that their basic view turns more on a question of impairment of the obligation to the Board's bondholders, than on the Board's asserted unqualified right to levy an annual tax not to exceed 5½ mills.

Hawthorne, J., dissents from the refusal of a rehearing.

Opinion of the Trial Court

Plaintiff, Vincent Dantoni, a property owner and taxpayer, seeks to enjoin the defendant, The Board of Levee Commissioners of the Orleans Levee District, hereinafter referred to as "Levee Board", from levying or attempting to levy any tax in excess of 3-½ mills for the years 1955 through 1959, inclusive, and 2 mills thereafter, as provided for by Section 2 of Article XVI of the Constitution of 1921, as amended by Act 756 of 1954, which amendment was ratified by vote of the people in the November 2, 1954, election. The said amendment reads as follows:

"For the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, the governing authority of each district, with the exception of the Board of Levee Commissioners of the Orleans Levee District, may levy annually a tax not to

exceed five (5) mills on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, may levy annually for the years 1955, 1956, 1957, 1958 and 1959 a tax not to exceed three and one-half (3½) mills, and annually thereafter a tax not to exceed two (2) mills, on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. Should the necessity arise in any levee district to raise additional funds for such purposes, the said tax may be increased when the rate of such increase and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property taxpayers of said district qualified to vote and voting at such election. Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred."

Louis J. Roussel, hereinafter referred to as "Intervenor Roussel", intervened as a bondholder and has joined with the Levee Board in resisting plaintiff's demand.

Edgar B. Stern, Sr., Robert E. Craig II, Charles Keller, Jr., Gervais Favrot and Leon Heymann, hereinafter referred to as "Intervenors Stern et al", property owners and taxpayers, also intervened and joined with plaintiff in seeking an injunction.

At the outset, let it be understood that whereas the resolution of the Levee Board adopted on November 19, 1954, fixed the levee tax rate for the year 1955 at 5-½ mills, 5 mills of which were for the Levee Board's general fund and the other ½ mill being for the retirement of the Levee Board's obligation arising out of the issuance of bonds to defray the expenses of the artifical crevasse created at Caernarvon in the year 1927, in accordance with Article XVI (a) of the Constitution of 1921, al parties to this litigation admit that the said ½ mill tax is not involved in this litigation.

At the 1954 Legislature two related constitutional amendments were passed for submission to the people of the State of Louisiana:

1—Act 751 authorizing the Orleans Parish School Board to levy an additional 1-½ mills. This act was not to become effective unless Act 756, affecting the Levee Board's taxing power, was submitted to and approved by the electors.

2—Act 756 reducing the millage of the Orleans Levee Board. This act was not to become effective unless Act 751 authorizing the Orleans Parish School Board to levy an additional 1-½ mills was submitted to and approved by the electors.

Both constitutional amendments were opposed by the Levee Board at the Legislature, where they were passed, and both amendments were adopted by the people on November 2, 1954. The Levee Board's postion is that

its action in levying 5 mills for its general fund for the year 1955 is in conformity with the provisions of Article XVI, Section 2 of the Constitution, as amended by Act 756 of 1954, and that the limitation of 3-½ mills contained in the said amendment is qualified by the provision "that this amendment shall in no way affect or impair rights already acquired by the holders of bonds or other obligations of the Orleans Levee District already issued or incurred", and that since the levy of 5 mills was necessary to pay the Levee Board's current obligations and to take care of its bonded indebtedness, the limitation of 3-½ mills would impair the obligation to bondholders in violation of the said constitutional amendment. In the alternative the Levee Board contends that if the amendment of Article XVI, Section 2, is interpreted to limit the Levee Board to 3-½ mills, even though this may be insufficient to provide for current obligations and the retirement of bonded indebtedness, then such an interpretation would make the amendment a violation of Article IV, Section 15 of the Constitution of the State of Louisiana and Article I, Section 10 of the Constitution of the United States.

Intervenor Roussel resists and opposes the claim of the plaintiff on the ground that he is the holder and owner of certain bonds issued by the Levee Board and that Act 756 of 1954 is unconstitutional if it limits the right of the Levee Board to levy a tax of 3-½ mills on the dollar instead of 5 mills for the years 1955 through 1959, inclusive, and 2 mills thereafter, since it would impair the obligation of the prior bond contracts between himself and the Levee Board, in violation of Article I, Section 10 of

the Constitution of the United States and Article IV, Section 15 of the Constitution of the State of Louisiana.

Plaintiff and Intervenors Stern et al say that the provisions of the constitutional amendment are clear; that there is no necessity for the Board to levy taxes in excess of 3-½ mills to pay the obligation of the Board "already issued or incurred", which mature in 1955, and that the resolution of the Levee Board adopted on November 19, 1954, insofar as it exceeds the 3-½ mill limitation, is a nullity. They further contend that a reduced tax of 3-½ mills will not in fact impair the obligations of any of the Levee Board's contracts because the taxes to be realized for 1955 from such millage will be more than sufficient to discharge the Levee Board's fixed charges for that year and that the balance thus remaining, together with the Levee Board's other admitted anticipated revenue for 1955, will enable the Levee Board to pay all outstanding obligations of the Levee Board and still have a balance of over $2,600,000.00 for the Levee Board's operations during 1955.

The defendant Levee Board relies on the language of the constitutional amendment that it shall not affect or impair rights and obligations "already acquired", or "already issued or incurred". Further that it is the Levee Board's duty, right and obligation to carry on its operations and to levy the entire 5 mills, as it has done since 1939, to pay the "current obligations", which it will incur, in its sole discretion, in 1955. The amendment clearly states "that this amendment shall in no way affect or impair rights *'already acquired'* by holders of bonds or

other obligations of the Orleans Levee District 'already issued or incurred'." That language can only be interpreted to mean obligations of the Levee Board which had been acquired before the adoption of the amendment in 1954. No other construction can be placed thereon.

The Levee Board under the law, Revised Statutes 38:1238, is charged with the duty of collecting and disbursing the taxes authorized by law, to-wit:

"The board and all officers charged with the assessment, levy, extension, collection, and custody and payment of these taxes shall collect, levy, extend, and disburse the taxes as herein provided. Their duties shall exist and these provisions shall be irrepealable as long as any obligations of the board are unpaid. The provisions shall always be enforceable by mandamus and injunction and by other suitable remedy in court. The commissioners shall not contract in any one year any liability beyond the revenues of the levee district for two years."

The Levee Board contends that because of this statute, it is required to exercise its full taxing power as long as any of its obligations remain unpaid.

The foregoing section of the Revised Statutes was Section 7 of Act 93 of 1890. This act created and related exclusively to the Orleans Levee District. In Section 5 the tax was limited to 1 mill. Since the constitutional amendment of 1954 provides for a 3-½ mill rate, certainly the obligation of the Levee Board is more than fulfilled. Further, the only tax rate that is actually dedicated to

the payment of any of the Levee Board's bonds is the foregoing 1 mill tax established by the Act 93 of 1890. The only outstanding bonds issued prior to the 1921 Constitution are the 1909 issue, two of which are held by Intervenor Roussel. All other bonds were issued after the adoption of the 1921 Constitution. There was no dedication in that Constitution of any specific amount for the payment of bonds. Article XVI, Section 2 simply provides that "a tax not to exceed five mills" may be levied annually.

The Levee Board was not, therefore, required to collect the entire 5 mills under the 1921 Constitution. It was obligated thereunder to levy during each year only that portion of the authorized 5 mills that was needed together with other income for that year to satisfy its obligations then maturing. Implicit in the language of the 1921 Constitution is the obligation to collect the 1 mill tax dedicated under the 1890 statute. As stated, the reduced tax limit in the 1954 constitutional amendment exceeds the 1-mill rate.

The case of *Board of Levee Commissioners v. Whitney Trust & Savings Bank*, 171 La. 28, 129 So. 658, cited by the Levee Board, contains nothing pertinent to the present issue. That case merely held that the mandamus provisions of the 1890 statute to compel a levy of the necessary taxes to pay bonds and interest as they matured applied to all bonds issued by the Board. The Court, at page 661, said:

"The next question is whether the bond issue, . . . is additionally secured by the pledge of the taxing power of the levee board, so that a purchaser of the bonds may, in

case of default in the payment of the interest, principal or charges, compel the levee board, by judicial proceedings, to exercise its taxing power for the purpose of paying the interest, the principal, and the charges of the bonds, or any of them, *as they,* respectively, *mature.*"

The Court answered this question by saying (p. 662):

"Nor was it necessary to provide again for compulsory process, by mandamus or otherwise, to compel the levy and collection of the tax; for the provisions of the seventh section of Act No. 93 of 1890, *if in fact they were ever necessary,* are as applicable now to the tax limitation of five mills as they originally were to the limitation of one mill on the dollar."

In this case the Levee Board may, or an unsatisfied creditor may compel it to, levy a tax up to 5 mills when that is necessary to pay matured obligations which arose during the time the unlimited 5-mill authority existed.

The 1890 statute is limited to a dedication of 1 mill. Act 756 of 1954, the constitutional amendment, authorizes 3-½ mills for 1955 through 1959 and 2 mills thereafter. It is patent, therefore, that said constitutional amendment in no manner conflicts with the 1890 statute.

It is a cardinal rule that every presumption of law and fact must be indulged in favor of the legality of a constitutional amendment. *Grosjean v. Standard Oil Co.,* 184 La. 45, 156 So. 325; *Ward v. Leche,* 189 La. 113, 179 So. 152; *State ex rel Kemp v. City of Baton Rouge et als.,*

215 La. 315, 40 So. 2d., 477; *Conley v. City of Shreveport et al.*, 216 La. 78, 43 So. 2d., 223.

All doubt as to the validity of a statute or constitutional amendment should be resolved in favor of its constitutionality, and further that the Legislature is presumed to have acted only after a thorough investigation and upon finding that the interest of the public required the legislation. *Board of Barber Examiners of La. v. Parker,* 190 La. 214, 182 So. 485.

In this case the burden is upon the defendant and those who espouse its cause to establish affirmatively and prove the alleged unconstitutionality of the amendment assailed. *Jones v. State Board of Education,* 219 La. 630, 53 So. 2d., 792; *State ex rel. Porterie et al. v. Jones et al.*, 181 La. 390, 159 So. 594.

There is no dispute that generally a statute may not impair the obligation of a contract, but this does not mean that all taxing statutes in existence at the time of issuance of a bond must remain unchanged, or that the rate of taxation may not be reduced under any circumstances.

It is only when the revenue realized from the reduced taxes together with the Levee Board's other income is insufficient to pay antecedent obligations as they become due, that the amending enactment violates the constitutional provisions safeguarding the impairment of its obligations.

The rule is stated in ALR as follows:

"Where other means remain for payment of obligations.

"The constitutional objections to legislation reducing the taxing power of municipality would not seem to be applicable where the municipality still has adequate revenues or resources with which to pay its obligations according to their terms.

* * * * * * * *

"A statute reducing the rate of taxation is not subject to the constitutional objection that it impairs the obligation of outstanding municipal bonds, where it does not appear that the obligation of such bonds would in fact be impaired or that they could not be paid out of the taxes realized under the new rate." 156 ALR pp. 1270-71, 1275.

In one of the cases cited to the foregoing note, the Court said:

"After a municipal corporation has contracted a valid debt, any act which would deprive it, to any considerable extent, of the means of payment would be void under the federal Constitution, but it does not appear that the obligation of any contract would be impaired by this act or that the bonded indebtedness . . . cannot be paid if the act is obeyed." *People ex rel O'Connell v. Chicago & W. I. R. Co.* (1912), 256 Ill. 388, 100 N.E. 35.

The Supreme Court of the United States has stated the rule as follows:

"Where the resource of the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States * * *".—*Mobile v. Watson,* 116 U. S. 289, 305. See, also, *Hubert v. New Orleans,* 215 U. S. 170; *Hicks v. Cleveland,* 106 Fed. 459, 463.

The Supreme Court of Louisiana has refused to declare invalid the repeal of a tax statute which supported the payment of bonds, without a showing that such reduction in revenue would, in fact, prevent the payment of these obligations.

"But plaintiff urges that the repealing act should not be so interpreted as to violate the obligation of a contract, and points out that the Atchafalaya basin levee district has issued bonds, and that the taxes here involved are intended for the purpose of paying, in part, the bonds issued, and are dedicated to that end. It is a fundamental principle that no law can be passed and permitted to stand that violates the obligation of a contract. *However, we are not prepared to hold that the repeal of the laws authorizing the levy and collection of this produce tax will affect the payment, in due course, of the bonds issued. The district has other means provided it and set aside for that purpose.* It is fair to presume that the Legislature considered this question before passing the

repealing act and found that the laws authorizing the collection of the taxes involved herein could be repealed without detriment to the bonds issued." *Board of Com'rs of Atchafalaya Basin Levee Dist. v. C. Lagarde Co., Ltd., et al.*, 120 So. 25, 29, 167 La. 612 (1928).

The evidence in this case is to the effect that the Levee Board voiced its opposition to the proposed constitutional amendment and presented to the Legislature full and complete information concerning the said legislation. After consideration thereof, the Legislature resolved to pass the constitutional amendment and reduced the tax rate to 3-½ mills for the years 1955-1959 and thereafter to 2 mills, which it had a right to do, and the people concurred therein at the November 2nd 1954 election.

The constitutional amendment of 1954 expressly states that it "shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred." This reservation hardly was necessary, and it is simply an express recognition of the obligation implicit in the amendment. That is to say, if any such creditor is unable to satisfy his claim against the Levee Board, he may bring appropriate proceedings to have an additional tax levied up to the previous 5-mill limitation.

This was recognized in *State ex rel Marchand v. New Orleans*, 37 La. Ann. 13. In that case relator had entered into a contract with the City of New Orleans at a time when the city had a taxing power of 12-½ mills. By constitutional revision this power was reduced to 10 mills. Recovering

judgment, which remained unsatisfied, relator mandamused the city to assess the additional 2-½ mills to provide funds for the liquidation of his judgment. The Court stated the principle applicable to the case as follows:

"Under the consistent jurisprudence of the Supreme Court of the United States and of this Court, *the power of taxation* existing at the time of the contract is read into the contract and *continues to exist, so far as necessary* for the enforcement of the obligations of the contract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation. *State ex rel Moore v. City*, 32 Ann. 726; *State ex rel De Leon v. City*, 34 Ann. 477; *State ex rel Carnere v. City*, 36 Ann. 687; *Von Hoffman v. Quincy*, 4 Wall. 535 (18 L. Ed. 403); *Wolff v. New Orleans*, 103 U. S. 358 (26 L. Ed. 395); *Nelson v. St. Martin*, 111 U.S. 720 (4 Sup. Ct. 648, 28 L. Ed. 574).

The Court thereupon disposed of the matter by saying:

"From the foregoing statement, it appears that, *to the extent necessary for the provision for payment of plaintiff's judgment*, the city possesses a residuary power of taxation of two and one-half mills . . ."

So, here, as in the Marchand case, there is a residuary power of taxation of 1-½ mills. In the absence of other funds to satisfy any of its unpaid matured obligations, the Levee Board may voluntarily, or by mandamus, be forced to, assess the additional tax. That situation does not exist in this case, and there is no necessity therefor.

The evidence shows that the cash and securities owned by the Levee Board as of October 31, 1954 (Exhibit D-14) were valued by it at $1,305,513.04. Its cash and securities as of December 31 for each year since 1948 have exceeded the foregoing figure (Exhibit B-1); that the Levee Board carried its Bohemia Spillway oil lands at $406,129.04 (Exhibit D-14, Hill 1), the cost of the land, and that the admitted income of the Levee Board from the oil wells on said land is $1,200,000 annually (Exhibit D-4, p. 2; Exhibit D-9; Exhibit D-10).

Further, that the lots owned by the Levee Board were carried on its balance sheet at cost (Exhibit D-14, Hill 1), and the price to be obtained for these lots was shown to be $4,200,000, from which the Levee Board will receive $2,442,000.00 (Exhibit D-4, pp. 2, 6), during 1955.

The foregoing figures indicate the liquid assets of the Board irrespective of its other assets (Exhibit D-14, Hill 1).

The assessed valuation of property within the Orleans Levee District has increased from approximately $481,000,000 in 1936 to over $767,000,000 in 1955, an increase of over 62% (Exhibit Kranz 3).

Based on the Levee Board's figures (Exhibit D-9), it will receive net taxes based on 3-½ mills for the year 1955 of—

$2,403,792.

The Board's fixed charges for 1955 are

Interest on bonds	$198,475	
Principal maturities—bonds	924,000	
Dock Board—canal contract	925,000	2,047,475
(Exhibits D-9 and D-7)		
Balance remaining from 3-½ mill net tax after payment of all fixed charges		$ 356,317
Other anticipated income for 1955, including oil royalties, sale of lots, collection of mortgage notes, interest on mortgage notes, rents, etc. (Exhibit D-9)		$3,997,000
Income in excess of amount needed in 1955 for bonded indebtedness and Dock Board contract ..		$4,353,317
Obligations of Board under outstanding contracts (Exhibit D-11, p. 2) ...		1,676,854
Balance after payment of fixed charges and all other outstanding contractual liability		$2,676,463

The foregoing figures demonstrate that a 3-½ mill tax rate, exclusive of other income, is more than adequate to pay all of the Levee Board's bonded and Dock Board indebtedness maturing during 1955 (Exhibit Roussel 1). They also show that after paying all fixed charges for 1955, and all "already" existing obligations maturing in November and December, 1954, and the year 1955, the Board will have $2,676,463 for operations and new constructions.

The total expenditures of the Levee Board, including bonded indebtedness, Dock Board contract, new construction, etc., for the last three years were Exhibit D-8, as follows:

1951	$5,639,148
1952	5,077,952
1953	5,245,588

As above pointed out, the Levee Board anticipates a total revenue, including net taxes at 3-½ mills, for 1955 of $6,400,792 (Exhibit D-9). This anticipated revenue exceeds by a million dollars the total expenditures for each of the years 1951 to 1953, and is nearly twice as much as the expenditures of the Levee Board in the preceding years of 1939-50 (Exhibit D-8).

The Board seeks to project an anticipated deficit of $537,183.00 (Exhibit D-9) from its expenditures and proposed new construction work for 1955 if its tax is limited to 3-½ mills. This suggested deficit simply results from an unrealistic construction program for 1955.

It proposes (Exhibit D-9) new work by private contractors in 1955 amounting to $3,705,500. The aggregate of new construction work for the entire four years of the previous administration was only $3,34',956 (Exhibit C, p. 17). The total expenditures for new construction by the Board for the five-year period of 1949-953 was only $5,764,451.

The adoption by the Legislature of Act 756, and the approval by the people of the amendment to the constitution, was an expression of their opinion that the millage would be adequate and sufficient for the Levee Board to conduct and operate its affairs, as well as to meet its obligations.

For the foregoing reasons a writ of injunction will issue herein against the Levee Board, enjoining, restraining and prohibiting the said Levee Board from levying and collecting annually a tax in excess of that provided for in the constitutional amendment of 1954; provided, however, that should the necessity arise for the Orleans Levee Board to raise additional funds for the purposes set forth in Section 2 of Article XVI of the Constiution of Louisiana for the year 1921, as amended by Act '56 of 1954, the said tax may be increased, not to exceed 5 nills, when the rate of such tax increase and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property taxpayers of said Orleans Levee Dstrict qualified to vote and voting at such election; all as set forth and provided in the constitutional amendment hereinabove just recited.

The said writ of injunction to issue upon plaintiff furnishing bond in the sum of $1,000, conditioned as the law directs.

New Orleans, Louisiana, December 23, 1954.

(s) F. J. Stich
JUDGE

APPENDIX B

United States Constitution,
Article I, Section 10
(excerpt)

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .

Louisiana Act 751 of 1954
(excerpt)

Senate Bill No. 36

A JOINT RESOLUTION

Proposing an amendment to Section 16 of Article XII of the Constitution of the State of Louisiana, relative to the powers of the Orleans Parish School Board to levy taxes, issue bonds and incur debts.

Section 1. Be it resolved by the Legislature of Louisiana, two-thirds of all the members elected to each house concurring, that at the next election for representatives in Congress to be held throughout the State on the 2nd day of November, 1954, there shall be submitted to the electors, for their approval or rejection, in the manner provided by the Constitution and general election laws of the State, a proposition to amend Section 16 of Article XII of the

Constitution of Louisiana of 1921, so as to read as follows:

Section 16. The Orleans Parish School Board, or its successor in law, shall levy annually for the years 1955, 1956, 1957, 1958, and 1959 a tax not to exceed eleven and one-half (11½) mills, and annually thereafter a tax not to exceed thirteen (13) mills, on the dollar on the assessed valuation of all property within the City of New Orleans assessed for City taxation and shall certify the fact to the Council of the City of New Orleans, or other governing body of said City, which shall cause said tax to be entered on the tax rolls of said City, and collected in the manner and under the conditions and with the interest and penalties prescribed by law for City taxes. The money thus collected shall be paid daily to said Board.

* * * * * *

Section 2. This amendment shall not become effective until and unless Senate Bill No. 37, proposing an amendment to Article XVI, Section 2 of the Louisiana Constitution of 1921, has been submitted and approved by the electors in the manner provided by the Constitution.

* * * * * *

Louisiana Act 756 of 1954

Senate Bill No. 37

A JOINT RESOLUTION

Proposing an amendment to Section 2 of Article XVI of the Constitution of Louisiana, to provide for the annual levy of taxes by the governing authority of levee districts.

Section 1. Be it resolved by the Legislature of Louisiana, two-thirds of all the members elected to each house concurring, that at the next election for representatives in Congress to be held throughout the State on the 2nd day of November, 1954, there shall be submitted to the electors, for their approval or rejection, in the manner provided by the Constitution and general election laws of the State, a proposition to amend Section 2 of Article XVI of the Constitution of 1921, so as to read as follows:

Section 2. For the purpose of constructing and maintaining levees, levee drainage and for all other purposes incidental thereto, the governing authority of each district, with the exception of the Board of Levee Commissioners of the Orleans Levee District, may levy annually a tax not to exceed five (5) mills on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, may levy an-

nually for the years 1955, 1956, 1957, 1958 and 1959 a tax not to exceed three and one-half (3½) mills, and annually thereafter a tax not to exceed two (2) mills, on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. Should the necessity arise in any levee district to raise additional funds for such purposes, the said tax may be increased when the rate of such increases and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property taxpayers of said district qualified to vote and voting at such election. Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred.

Section 2. This amendment shall not become effective until and unless Senate Bill No. 36, proposing an amendment to Article XII, Section 16 of the Louisiana Constitution of 1921 has been submitted to and approved by the electors in the manner provided by the Constitution.

Section 3. There shall be printed upon the official ballot to be used at said election the words:

FOR the proposed amendment to Section 2 of Article XVI of the Constitution of 1921, decreasing the tax millage of the Board of Commissioners of the Orleans Levee District.

and the words:

AGAINST the proposed amendment to Section 2 of Article XVI of the Constitution of 1921, decreasing the tax millage of the Board of Commissioners of the Orleans Levee District.

And each elector shall indicate his vote on the proposed amendment as provided by the General Election Laws of the State of Louisiana.

Louisiana Constitution,
Article 16, Section 2
(prior to 1954 amendment)

For the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, the governing authority of each (levee) district may levy annually a tax not to exceed five mills on the dollar on all taxable property situated within the alluvial portions of said districts subject to overflow, and should the necessity arise to raise additional funds for such purposes, the said tax may be increased when the rate of such increase and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property taxpayers of said district qualified to vote and voting at such election.

Resolution of Respondent Levee Board,
dated November 19, 1954

BE IT RESOLVED, By The Board of Levee Commissioners of the Orleans Levee District, that, exercising its powers granted under the Constitution and laws of the State of Louisiana, it does hereby fix the levee tax rate for the year 1955 at FIVE AND ONE-HALF (5½) MILLS on the taxable dollar, FIVE (5) MILLS of which are to apply as levee taxes for the Board's General Fund, and ONE-HALF (½) MILL to remain in force, as previously, for the retirement of the Board's obligation arising out of the issuance of bonds to defray expenses of the artifical crevasse created at Caernarvon in the year 1927; and

BE IT FURTHER RESOLVED, That the Secretary of this Board be and he is hereby authorized and directed to furnish a copy of this resolution to the Honorable George Montgomery, State Tax Collector, for his guidance in the collection of taxes and in the preparation of tax receipts to be issued by him for the year 1955.

APPENDIX C

Answer of the Board of Levee Commissioners of the Orleans Levee District, par. 15 (R 12)
(excerpt)

That in the alternative, if the taxing power of the Board is limited to three and one-half (3 ½) mills as provided in Act 756 of 1954 before the satisfaction of bonded obligations incurred prior to its passage and which were secured by the Board's taxing power of five (5) mills, then the act and its subsequent adoption as an amendment to Article 16 of the Constitution of Louisiana, is unconstitutional as a violation of Article 1, Section 10 of the Constitution of the United States, and in violation of Section 15, Article 4 of the Louisiana Constitution, both of which constitutional provisions are specially pleaded.

Petition of Intervention by Louis J. Roussel, par. 13
(R 18-19)
(excerpt)

Intervenor avers that the said Act 756 of 1954 is unconstitutional for the reason that said Act impairs the obligations of the contracts under which said bonds held by intervenor were issued in violation of Section 15 of Article IV of the Louisiana Constitution and of Section 10, Article I of the Constitution of the United States,

both of which constitutional provisions are specially pleaded herein as fully as if copied herein in extenso.

Intervenor further avers that the said limitation on and reduction of the taxing power of the Board of Commissioners of the Orleans Levee District is necessarily an impairment of the obligation of the bond contracts since it diminishes the revenues of the said Board and impairs the said Board in the payment and discharge of its bonded indebtedness both in principal and in interest.

Original Brief in Behalf of Louis J. Roussel, Intervenor-Appellant, Syllabus (excerpt, p. 2)

No state can enact any statute or law impairing the obligation of contracts.

* * * * * * * *

The question of impairment of the obligation of contracts is not one of degree but rather is one of encroachment in any respect and an impairment occurs when the value of the contract has been diminished by subsequent legislation.

APPENDIX D

Trial Exhibit D-9
(page 1)

BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT

ANTICIPATED RECEIPTS AND EXPENDITURES
YEAR 1955

	Based On 5 Mills	Based On 3½ Mills
OPERATING RECEIPTS		
Tax Collections—Net	$3,444,397	$2,403,792
Royalties from Oil	1,200,000	1,200,000
Airport Receipts	75,000	75,000
Rents—Lake Front Properties	45,000	45,000
Rents—Spillway Lands	40,000	40,000
Miscellaneous	50,000	50,000
TOTAL	$4,854,397	$3,813,792
REAL ESTATE TRANSACTIONS		
Sale of Squares—Lakeshore	$ 67,000	$ 67,000
Sale of Lots—Lake Terrace	2,375,000	2,375,000
Collections—Mortgage Notes	100,000	100,000
Interest—Mortgage Notes	20,000	20,000
Meter Refunds—N. O. P. S. Inc.	25,000	25,000
TOTAL	$2,587,000	$2,587,000
GRAND TOTAL RECEIPTS	$7,441,397	$6,400,792

EXPENDITURES		
Interest on Bonds	$ 198,475	$ 198,475
Principal Maturities—Bonds	924,000	924,000
Dock Board—Canal Contract	925,000	925,000
Employees' Retirement Fund	40,000	40,000
Insurance—Fire, Compensation, Liability	30,000	30,000
Airport Expenditures	90,000	90,000
New Equipment	50,000	50,000
Material & Supplies	150,000	150,000
Payrolls	775,000	775,000
Miscellaneous	50,000	50,000
New Construction—Contract Work	3,705,500	3,705,500
TOTAL	$6,937,975	$6,937,975
NET RESULT	$ 503,422	*$(537,183)*

FILED
JUN 24 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 836 116

EDGAR B. STERN, ET AL.,
Petitioners,

versus

THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, ET AL.,
Respondents.

OPPOSITION TO GRANTING THE PETITION FOR CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

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THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, ET AL.,

Respondents.

OPPOSITION TO GRANTING THE PETITION FOR CERTIORARI.

May It Please the Court:

In presenting an opposition to the granting of a writ of certiorari it is felt that a more detailed statement of the case would be desirable.

STATEMENT OF THE CASE.

This suit was instituted in the Civil District Court for Orleans Parish by a taxpayer who sought to enjoin the defendant, The Board of Levee Commissioners of the Orleans Levee District (hereinafter referred to as "Levee Board"), from levying a tax in excess of 3½ mills for the years 1955 through 1959 inclusive and 2 mills thereafter.

Section 2 of Article XVI of the Louisiana Constitution of 1921 originally provided that the levee districts in the State of Louisiana had the right to levy a tax not in excess of 5 mills on the dollar. In 1954 the Louisiana Legislature enacted Act 756 as a proposed constitutional amendment, which amendment was adopted by the citizens of Louisiana in the November 2, 1954, election. The amendment reads as follows:

> "For the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, the governing authority of each district, with the exception of the Board of Levee Commissioners of the Orleans Levee District, may levy annually a tax not to exceed five (5) mills on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, may levy annually for the years 1955, 1956, 1957, 1958 and 1959 a tax not to exceed three and one-half (3½) mills, and annually thereafter a tax not to exceed two (2) mills, on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. Should the necessity arise in any levee district to raise additional funds for such purposes, of such increase and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property tax-

payers of said district qualified to vote and voting at such election. *Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred.*" (Emphasis supplied).

Subsequent to the adoption of this constitutional amendment, the Levee Board on November 19, 1954, passed a resolution levying a tax of five (5) mills on the dollar for the year 1955. The present suit followed. There was an answer filed on behalf of the defendant, the Levee Board, which in substance set forth as a defense that the language of the constitutional amendment quoted above provided that it should not affect or impair the rights and obligations already issued or incurred. The Levee Board further contended that it had the duty, right and obligation to carry on its operations as a levee district and that, therefore, it had the right to levy the entire five (5) mills tax in order to pay the principal and interest on the bonded indebtedness accruing in 1955 and in order to pay the current obligations which it would incur in 1955.

Louis J. Roussel, President of the Levee Board, in his individual capacity intervened in the suit in the Civil District Court and opposed the claims of the plaintiff taxpayer on the ground that intervenor was the holder and owner of ten bonds issued by the Levee Board. Roussel contended that Act 756 of 1954 was unconstitutional if it limited the right of the Levee Board to levy a tax of 3½ mills on the dollar for the years 1955 through 1959 inclusive, and only 2 mills thereafter, since it would impair the obligations of the prior bond contracts entered into

between intervenor and the Levee Board, in violation of Article 1, Section 10, of the Constitution of the United States, and Article 4, Section 15, of the Constitution of the State of Louisiana.

There was an intervention also filed by the present petitioners (hereinafter referred to as Intervenors Stern, et al.) wherein Intervenors Stern, et al., sought to join with the original plaintiff in opposition against the Levee Board and against the claims asserted by Intervenor Louis J. Roussel. Intervenors Stern, et al., in their petition of intervention reiterated and adopted most of the allegations of fact contained in the plaintiff's petition which related to the adoption of Act 756 of 1954 and the actions of the Levee Board in attempting to levy a tax of 5 mills on the dollar for the year 1955. Intervenors Stern, et al., alleged in their petition that the Levee Board acted without authority in passing a resolution levying a tax in excess of 3½ mills on the dollar for 1955 and that the unauthorized imposition of this additional taxation would result in the taking of intervenors' property without due process of law, in violation of Article 1, Section 2, of the Louisiana Constitution of 1921, and of Article XIV, Section 1, of the United States Constitution. Intervenors prayed in their petition of intervention for an injunction to issue restraining and prohibiting the Levee Board from levying this tax in exc ss of the constitutional limitation.

The case was tried in the Civil District Court upon these issues and the district judge rendered judgment in favor of the original plaintiff and in favor of the Intervenors Stern, et al., and issued a writ of injunction against the Levee Board enjoining, restraining, and prohibiting

the Levee Board from levying and collecting annually a tax in excess of that provided for in the constitutional amendment of 1954.

A suspensive appeal was prosecuted to the Supreme Court of the State of Louisiana by the Levee Board and by the Intervenor Louis J. Roussel, and the matter was tried in the Louisiana Supreme Court upon written briefs and upon oral argument. The Louisiana Supreme Court by a majority opinion of five of the justices, with two justices dissenting, reversed the judgment of the district court and dismissed the suit of the original plaintiff taxpayer, Vincent Dantoni. Application for a rehearing was filed by the original plaintiff, Vincent Dantoni, and by the Intervenors Stern, et al., which application for rehearing was denied in a *per curiam* opinion.

These are the essential pleadings, decisions, and legal issues which are found in the record of this case and upon which necessarily the application for certiorari must rely.

REASONS IN SUPPORT OF OPPOSITION TO GRANTING OF THE PETITION FOR CERTIORARI.

We submit to Your Honors that the basic tenor of the brief filed by petitioners indicates an effort to persuade this Court that the Supreme Court of the State of Louisiana has attempted to avoid a federal constitutional question in order to defeat this Court of jurisdiction. Petitioners in advancing such argument have sought to impugn the good faith of the decision reflected in the majority opinion of the Louisiana Supreme Court.

On page 9 of petitioners' brief the interpretation of the Louisiana Supreme Court is referred to as a "curious interpretation". On page 10 of petitioners' brief the *per curiam* opinion of the Supreme Court wherein the application for rehearing was denied is referred to as a "concededly extraordinary opinion."

The question, plain and simple, before this Court upon this application for a writ of certiorari is whether the Louisiana Supreme Court has decided a federal question of substance in such manner as would warrant the review of the decision by this Court. The granting of the writ is not a matter of right, but rather of sound judicial discretion, and it seems clear that the burden of showing the need for the exercise of such judicial discretion rests with petitioners.

An analogous situation is found in the case of *Tampa Waterworks Company v. City of Tampa*, 199 U. S. 241, 26 S. Ct. 23, 50 L. Ed. 170 (1905). In that case the Waterworks Company had filed suit in the State Court alleging a contract between itself and the City of Tampa whereby the Waterworks Company was to erect waterworks and to have the right to charge certain rates for the use of its water for thirty years. Subsequently, the City passed an ordinance wherein it fixed lower rates as the maximum price to be charged the City by any company. The Waterworks Company contended that this ordinance impaired the obligation of its contract and that it had the effect of taking its property without due process of law in violation of the federal constitution. The City filed a plea of justification and the bill of complaint was dismissed. Upon appeal to the State Supreme Court the

decision was affirmed. Upon writ of error and review to the United States Supreme Court this Court held that it did not have any grounds for reversing the decision of the State Court. The pertinent portion of this Court's opinion is as follows:

> "This Act was construed by the Supreme Court of Florida, as we understand it, to mean that cities might establish reasonable maxima in any case where they could do so without impairing the obligation of contracts. Therefore the Act was held to authorize the ordinance complained of unless the ordinance was open to Constitutional objection. This construction of the statute is a very slight extension of the direct meaning of the words used, and seems to us reasonable even if a somewhat different one could be conceived. Of course it removes any question of constitutionality from the statute, and therefore there seems to be no ground for reviewing the decision upon that point."
>
> (199 U. S. 243).

In *Quong Ham Wah Company v. Industrial Accident Commission of the State of California*, 255 U. S. 445, 41 S. Ct. 373, 65 L. Ed. 723 (1921), there was involved a writ of error and review of a decision of the State Supreme Court of California. The decision of the State Supreme Court held that a section in the California Workmen's Compensation Statute discriminated against nonresidents and was consequently repugnant to the Constitution of the United States. Upon rehearing in the State Supreme Court this judgment was reversed and it was held that the provision of the State Act was not in violation of the constitution; and the State Court interpreted the section in

the State Act so as to include citizens of other states and, therefore, foreclosed any question as to discrimination. The argument was made in this Court that despite the construction of the statute by the State Supreme Court that the decision must still be treated as being repugnant to the federal constitution. It is significant to note that this Court rejected the argument of plaintiffs in error and we quote the following pertinent language from the opinion of this Court:

> "But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute, and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. *It follows that the argument but accentuates the frivolous character of the federal question relied upon.*" (Emphasis supplied).
>
> (255 U. S. 449).

We submit that the questions involved in the present controversy do not involve a federal question and that the Louisiana Supreme Court has not acted in bad faith and has not sought to avoid any federal question. In *McCoy v. Shaw*, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891 (1928), this Court pointed out:

> "It is well settled that a judgment by a state court which is put upon a nonfederal ground, independent of federal questions involved and broad

enough to sustain judgment, cannot be reviewed by this court unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of decision on federal question."

(277 U. S. 303).

In the present instance petitioners have sought to predicate their application for the writ on the theory that the Louisiana Supreme Court has avoided the federal question, i. e., that under the Contracts Clause the taxing power of a state agency which has outstanding bonds cannot be limited to any extent as long as such bonds are outstanding. On page 15 of the brief of petitioners this is referred to as the essential holding of the State Supreme Court. Petitioners then state that "this question is novel in this court" and that the decision "appears to be in conflict with the rationale of this Court's holding in *Mobile v. Watson*," 116 U. S. 289, 305 (1886). In substance, therefore, it is seen that petitioners are attempting on the one hand to imply that the State Supreme Court has avoided a federal constitutional question, and then on the other hand to admit that the constitutional question is novel in this Court.

In *Radio Station WOW v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092, motion denied, 66 S. Ct. 11 (1945), this Court stated:

"But it is not for us to consider the correctness of the nonfederal ground unless it is an *obvious* subterfuge to avoid consideration of a federal issue." (Emphasis supplied).

(326 U. S. 129).

In *Demorest v. City Bank Farmers Trust Company*, 321 U. S. 36, 64 S. Ct. 384, 88 L. Ed. 526 (1943), the decision of the State Court was affirmed upon appeal. The concurring opinion of Mr. Justice Douglas and Mr. Justice Black states:

> "That is a question of New York law on which the New York court has the final say. It is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. And there is no suggestion here that state law has been manipulated in evasion of a federal Constitutional right. Consequently, I can see no possible claim to substantiality of any federal question, whatever view may be taken of the due process clause. I would therefore dismiss the appeal."
>
> (321 U. S. 49).

In *Broad River Power Company v. State of South Carolina, ex rel. Daniel*, 281 U. S. 537, 50 S. Ct. 401, 74 L. Ed. 1023 (1930), the writ of certiorari was dismissed, and in its opinion, this Court said:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which petitioners are entitled to invoke the judgment of this court. Even though the Constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decisions of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus evaded.

> . . . But if there is no evasion of the constitutional issue, . . . and the nonfederal ground of decision has fair support, . . . this court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."
>
> (281 U. S. 540-1).

In *Fox River Paper Co., et al., v. Railroad Commission of Wisconsin*, 274 U. S. 651, 47 S. Ct. 669, 71 L. Ed. 1279 (1927), this Court pointed out that in the absence of an evasion of a constitutional issue by the State Court that this Court must accept as final the ruling of the State Court of last resort on all matters of state law.

In *George O. Richardson Machinery Co. v. Scott*, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497 (1928), this Court held that where the decision of the State Court rested on an adequate nonfederal ground that a writ of certiorari must be dismissed, notwithstanding the discussions in the opinion of the State Court of constitutional questions.

Petitioners in this case have relied upon *Terre Haute and Indianapolis Railroad Company v. Indiana*, 194 U. S. 579, 24 S. Ct. 767, 48 L. Ed. 1124 (1904), which held that this Court may review a decision of a State Court where there was a clear evasion of a constitutional question by the State Court. Such decision, of course, is in keeping with the line of decisions of this Court, but, in order for such principle to apply to the instant case then it must necessarily be presupposed that the Louisiana

Supreme Court obviously and intentionally intended to evade a federal constitutional question.

We submit that in this case the Louisiana Supreme Court was placing an interpretation upon a State constitutional amendment and that the interpretation placed thereon was consonant with the well established jurisprudence of the State of Louisiana and the Supreme Court of the United States. See *State, ex rel. Moore v. City of New Orleans*, 32 La. Ann. 726 (1880); *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395 (1880).

We call to Your Honors' attention that there is a definite provision in the State constitutional amendment (Act 756 of 1954) that this amendment "shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred." It is submitted that the State Supreme Court in giving effect to the language of the legislative enactment necessarily sought to construe the constitutional amendment in such way so as to uphold the constitutionality of the amendment. Accordingly, there was an interpretation by the highest appellate court in the State of Louisiana involving the taxing power of a state agency under the terms and provisions of a state constitutional amendment. In such connection this Court has held that it will presume that the State Courts will construe a statute so as to uphold the State Act or even avoid serious doubts of its constitutionality. See *Douglas v. New York, N. H. and H. R. Co.*, 279 U. S. 377, 49 S. Ct. 355, 73 L. Ed. 747 (1928).

We do not agree with the discussions of petitioners in regard to the meaning and effect of the majority opin-

ion of the Supreme Court of the State of Louisiana, nor do we agree with the conclusions of petitioners in regard to the *per curiam* opinion of the State Supreme Court in denying the application for a rehearing. The majority opinion of the State Supreme Court is set forth in full in the brief of petitioners and is referred to in the brief as being a construction of whether the amendment violates the Contracts Clause. Reference is made by petitioners that "the subtlety of the invalidation amounts at most to an avoidance of the federal constitutional question at issue."

We submit that a reading of the majority opinion of the State Supreme Court clearly shows that the Court upheld the constitutionality of the State Constitutional amendment and interpreted the amendment so as not to reduce the taxing power from 5 mills to 3½ mills, which interpretation was in keeping with the language of the constitutional amendment that it would in nowise affect or impair rights already acquired by holders of bonds of the Orleans Levee District.

We further submit that petitioners have no justification for the statement that the *per curiam* decision of the State Supreme Court shows "the forthright abandonment" of all discussion of interpretation of the constitutional amendment. The first paragraph of the *per curiam* opinion reaffirms the correctness of the original majority opinion and states that the only reason why a discussion is entered into at all is in order to dispel the confusion that stems from the many erroneous statements that have been given widespread publicity. The *per curiam* opinion clearly points out that the taxing authority of the Levee Board has not been increased to 8½ mills as was errone-

ously reported in some sources, but that the maximum taxing authority of the Levee Board was 5 mills, which was the same rate of millage authorized prior to the enactment of the constitutional amendment. Such interpretation is not only logical but is in keeping with the provision in the constitutional amendment that no rights acquired by bondholders would be affected or impaired by the amendment.

It is respectfully submitted that there is no question involved in the present case in regard to the transfer of funds or taxing powers from one state agency to another, nor is the constitutionality or validity of any statute or constitutional amendment affecting the School Board of the City of New Orleans involved.

We respectfully submit, therefore, to Your Honors that the application for certiorari should be denied.

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JUL 1 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 336 116

EDGAR B. STERN, ET AL.,
Petitioners,

versus

THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, ET AL.,
Respondents.

OPPOSITION OF RESPONDENT THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT TO GRANTING PETITION FOR CERTIORARI.

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provide enough revenue for it to operate and to pay its bonded obligations, would violate Art. 1, Section 10 of the United States Constitution. Petitioners herein intervened on behalf of the plaintiff as taxpayers, and Louis J. Roussel intervened on behalf of the Board as a holder of its bonds.

The trial court issued an injunction restraining the Levee Board from levying and collecting a tax in excess of 3½ mills for 1955. The trial court in its decision, however, recognized a residuary power of taxation of 1½ mills if this were necessary.[1]

The trial court also recognized that 3½ mills would be insufficient for the Levee Board to pay its bonded obligations and also to finance its budget for 1955. But the budget, the Court said, was unrealistic.

On appeal this judgment was reversed by the Supreme Court of Louisiana. The court held that the 3½ mill tax was insufficient to meet the Board's budget and pay its bonded obligations; and the court interpreted Act 756 as authorizing the Board to levy up to 5 mills if this were necessary.

The court held that it was for the Board to determine in its budget what work was necessary, and that this was not subject to review without evidence of abuse. The court found no evidence of such abuse, no evidence

1. "So, here, as in the **Marchand** case, there is a residuary power of taxation of 1½ mills." Opinion of the Trial Court, Appendix "A", pages 13, 14. The text of Act 756 of 1954 is incorporated in the opinion of the Supreme Court. See Appendix "C", pp. 17-19.

that the budget was not correct or that the work was not necessary.[2]

In applying for a rehearing, counsel for intervening taxpayers, the petitioners herein, alleged that the court had recognized that a 3½ mill tax was sufficient to take care of the Board's obligations,[3] an allegation so flagrantly contrary to the findings of the court and so widely published that the court felt compelled to issue a *per curiam* opinion (admittedly a procedure not usually followed by the court in denying a rehearing), to correct counsels' misstatement of fact.[4]

Subsequent to the denial of a rehearing by the Louisiana Supreme Court, the Legislature adopted Act 138 of 1955,[5] which limits the taxing power of the Levee

2. "The attack on the budget seems to be leveled principally at the work proposed by the board. We find no evidence in the record that would justify us in saying that the items listed in the budget are not correct or that the work proposed was not necessary. The chief engineer of the Levee Board testified that the work proposed in the budget is necessary and there was no evidence offered to contradict him in this respect. We cannot substitute our judgment as to the feasibility of the work." Original opinion of the Supreme Court of Louisiana, Appendix "C", pages 17-19.

3. The same erroneous statement appears in the brief of counsel of petitioners at pages 2, 8 and 15.

4. "Counsel for the intervening taxpayers state in their brief: 'The Court does not question the clear and abundantly supported finding of the lower court that a 3½ mill tax will not only be sufficient to discharge all antecedent bonds and other obligations of the Board maturing in 1955, but will afford a balance of over $2,600,000 for the Board's other operations'. This statement is ridiculous because the facts as disclosed by the record show that the 3½ mills will produce only $2,403,792 whereas the outstanding obligations exceed this amount by $1,320,537." Opinion per curiam of the Supreme Court of Louisiana on Denial of Rehearing, Appendix "D", pages 20-21.

5. See Appendix "E".

Board to 3 mills, but which also makes provision for the payment of all the Board's bonded and contractual obligations. This act supplants Act 756 of 1954, and (when adopted at the polls) constitutes an amendment to Article 16, Section 2 of the Constitution of Louisiana.

On June 6, 1955, the Levee Board adopted a resolution rescinding and recalling the resolution adopted November 19, 1954,[6] which had levied 5 mills for the Board's General Fund for 1955; no taxes were or will be collected under the said resolution.

QUESTION AT ISSUE.

The petition for certiorari has presented the question at issue in a manner completely at variance with the facts. Counsel for petitioners present the question as follows:

> "Does the Contracts Clause of the United States Constitution categorically prohibit reduction in any degree of the taxing power of a state governmental agency (respondent Levee Board) which has bonds issued and outstanding, even though the attempted reduction *concededly* leaves the agency with tax revenues, which, with the agency's other revenue, are sufficient to meet its obligations under the bonds and under all other antecedent contract obligations maturing in the year at issue?" (Italics added). Petitioner's Brief, p. 2.

6. See Appendix "F".

It has never been conceded that the Levee Board has sufficient revenues to meet its obligations with its taxing power reduced to 3½ mills. In fact, the sole and only question at issue from the beginning has been whether reduction of the Levee Board's taxing power to 3½ mills would leave it sufficient revenue to meet its operating expenses and to pay its bonded obligations.

The Levee Board throughout has contended that 3½ mills would not leave it sufficient revenue to do this. Petitioners concede that the Levee Board possesses a residuary taxing power up to 5 mills *if this is necessary*;[1] the decision of the trial court recognized a residuary taxing power up to 5 mills *if this is necessary.*[2]

The question of necessity, therefore, was the only issue from the very inception of the case, and was resolved by the judgment of the Supreme Court of Louisiana that the reduction of its tax levy to 3½ mills would not leave the Levee Board with sufficient revenues to carry

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1. "So, here, as in the **Marchand** case, there is a residuary power of taxation of 1½ mills. In the absence of other funds to satisfy any of its unpaid matured obligations, the Levee Board may voluntarily, or by mandamus be forced to, assess the additional tax. As shall now be shown, however, there will be no necessity for any such action with respect to the year 1955, which is the only year involved in the instant case." Original Brief of Intervenors, Edgar Stern, et al., Appendix "B", pages 15-16.

2. "So, here, as in the **Marchand** case, there is a residuary power of taxation of 1½ mills. In the absence of other funds to satisfy any of its unpaid matured obligations, the Levee Board may voluntarily or by mandamus, be forced to, assess the additional tax. That situation does not exist in this case, and there is no necessity therefor." Opinion of the Trial Court, Appendix "A", pages 13-14.

out its duties and to pay its bonds, and that the use of the residuary tax power up to 5 mills was necessary.[3]

The decision of the Supreme Court, therefore, did not turn upon a federal question or even upon a legal question; but upon a simple question of fact.

The question at issue here is: Will this court take jurisdiction to review the decision of a state court holding that a state governmental agency, which concededly possesses a residuary taxing power up to 5 mills, is entitled to use its full taxing power since this is necessary for it to operate and to pay its bonded obligations?

ARGUMENT.

1. No Ground For Jurisdiction Exists.

The decision of the Louisiana Supreme Court involves the application as well as the interpretation of Louisiana Act 756 of 1954. As an interpretation of a statute of its state the decision of the Louisiana Supreme Court is not subject to review by this court where no federal question is involved.[1] Even where a federal question is involved, this court will not take jurisdiction to review the

3. "The observation of the trial judge that the budget was 'unrealistic' might be better applied to his conclusions rather than to the budget for nowhere in the record is found any basis or support for his conclusions which would not only leave the Board with an insufficient amount of money to pay its outstanding obligations but would leave it without funds to operate, maintain a levee system, and develop the Lakeshore area, from which most of its other revenue is derived, and would in effect abolish the Levee Board. It would leave the bondholders without the necessary machinery set up in the Constitution to collect and retire the bonds." Opinion Per Curiam of the Supreme Court of Louisiana on Denial of Rehearing, Appendix "D", pages 20-21.

1. **Highland Farms Dairy, Inc., v. Agnew**, 300 U. S. 608 57 S. Ct. 549 (1937); **Demorest v. City Bank Farmers Trust Co.**, 321 U. S. 36, 64 S. Ct. 348, 88 L. Ed. 526 (1943).

decision of a state court if the decision is based upon a non-federal ground sufficient to sustain the decision;[2] nor will the court take jurisdiction where the non-federal ground is indispensable to the decision of the state court.[3]

Counsel for petitioners apparently concede that the decision of the state court in the instant case does not involve a federal question, but they contend that the absence of a federal question results from the interpretation placed by the Louisiana Supreme Court on Act 756 of 1954.[4]

The charge is boldly made that the interpretation of Act 756 of 1954, holding that the act does not violate the federal constitution, was given purposely to defeat jurisdiction of this court. This charge of bad faith hurled at the Louisiana Supreme Court is not supported by any evidence inside or outside the record. In the absence of any such evidence, no ground for jurisdiction is presented, even under the devious theory presented by counsel for petitioners.[5]

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2. **Fox Film Co. v. Muller,** 296 U. S. 207, 56 S. Ct. 183; **Klinger v. State of Missouri,** 13 Wall. 257, 20 L. Ed. 635; **McCloy v. Shaw,** 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891 (1928); **McGoldrick v. Gulf Oil Corp.,** 309 U. S. 2, 60 S. Ct. 375, 84 L. Ed. 536.

3. **Fox Film Co. v. Muller, supra.**

4. A fundamental distinction might be pointed out here between the instant case and the **Terre Haute** case relied upon by petitioners. In the **Terre Haute** case the federal question evaded was indispensable to the decision. "The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation." **Terre Haute & Indianapolis Railroad Co. v. Indiana,** 194 U. S. 579, 24 S. Ct. 767, 769 (1904). As we have shown the non-federal question is indispensable in the instant case.

5. Where there is no intent to evade a federal question by the state court, its decision on an independent non-federal ground will not be reviewed. **Broad River Power Co. v. State of S. Carolina,** 50 S. Ct. 401, 281 U. S. 537, 44 L. Ed. 1023.

As has been pointed out, the decision of the Supreme Court is not only in keeping with the jurisprudence,[6] but is in keeping with the legal position taken by counsel for petitioners throughout the case.[7] Counsel for petitioners have even gone further in pointing out that the Levee Board would have a residuary taxing power up to 5 mills even if no provision for this had been made in Act 756 of 1954.[8] The decision of the Louisiana Supreme Court simply recognized the provision for the residuary taxing power under the provision of Act 756 of 1954; and recognized that the uncontradicted evidence in the case showed that it was necessary for the residuary taxing power to be used.

What other interpretation could the Louisiana Supreme Court have given to Act 756 of 1954? The only other interpretation possible would have been to hold that Act 756 of 1954 limited the Levee Board to a taxing power of 3½ mills under any and all circumstances. Such an

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6. **Moore v. City of New Orleans,** 32 La. Ann. 726 (1880); **Wolff v. New Orleans,** 103 U. S. 358, 26 L. Ed. 395 (1880).

7. "So, here, as in the **Marchand** case, there is a residuary power of taxation of 1½ mills. In the absence of other funds to satisfy any of its unpaid matured obligations, the Levee Board may voluntarily, or by mandamus be forced to, assess the additional tax. As shall now be shown, however, there will be no necessity for any such action with respect to the year 1955, which is the only year involved in the instant case." Original Brief of Intervenors, Edgar Stern, et al., Appendix "B", pages 15-16.

8. "Thus as heretofore pointed out, the constitutional amendment expressly states that it 'shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred.' This reservation hardly was necessary, and it is simply an express recognition of the obligations implicit in the amendment. That is to say, if any such creditor is unable to satisfy his claim against the Levee Board, he may bring appropriate proceedings to have an additional tax levied up to the previous 5-mill limitation." Original Brief of Intervenors Stern, et al., Appendix "B", pages 15-16.

interpretation would have made the act clearly violative of the Contracts Clause of the federal constitution.[9] Counsel for petitioners have never asked the court for such an interpretation; their position, in fact, has been consistently in keeping with the view adopted by the court, that the Levee Board possesses a residuary taxing power up to 5 mills if this is necessary.

They have disagreed only on the question of *necessity.*[10] The decision of the Supreme Court in the final analysis was based on the finding, as a matter of fact, that it was necessary for the Levee Board to make use of its residuary taxing power. Under the circumstances the question of necessity was indispensable to the decision of the court; and since it is a non-federal question of fact, there is no jurisdictional ground to warrant review by this court.[11]

II.

The Issues Involved Have Become Moot.

It must be pointed out further that the interpretation placed by the Supreme Court of Louisiana on Act 756

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9. **Moore v. City of New Orleans, supra.**

10. "Answering these contentions, intervenors say that the provisions of the amendment are clear; that there is no necessity for the Board to levy taxes in 1955 in excess of 3½ mills to pay obligations of the Board 'already issued or incurred' which mature in 1955. . . ." Original brief of Intervenors Stern, et al., p. 4.

11. **Fox Film Co. v. Muller, supra.** Since counsel for petitioners have conceded that the question of necessity has passed out of the case, it seems clear that there is no longer anything before the court. "What was considered an alternative contention by petitioners—that regardless of validity of the reduction in the Board's taxing power, the 5-mill levy should be reduced judicially as excessive and unnecessary for the proper discharge of the Board's functions—was rejected by the Supreme Court of Louisiana as beyond its powers, and has passed out of the case." See petitioners' brief, Note 11, page 8.

of 1954 has been accepted and acted on by the Louisiana Legislature in the passage of Act 138 of 1955, which provides for the reduction of the Levee Board's tax millage to 3 mills, but provides also for the full payment of all the Board's bonded and contractual obligations, thus removing the possibility of any constitutional problem in its application.[12]

The "questions of the power of states generally to adapt their taxing systems to expanding spheres of governmental operation, and to the shifting emphasis of governmental needs" raised in petitioners' brief at page 15 obviously have no application to the case at hand.

Although counsel for petitioners have tried vainly and repeatedly to rationalize some remote connection, the Orleans Parish School Board tax is likewise not involved. The additional School Board tax of 1½ mills authorized in 1954[13] under a separate amendment to a different part of the Constitution has already been levied and is being collected. The fate of the public schools of New Orleans, therefore, does not hinge on whether the Levee Board is authorized to levy more than 3½ mills of tax or not.

Finally, it should be pointed out that the resolution of the Levee Board of November 19, 1954, which formed the initial basis of the litigation herein, has been recalled

12. See Appendix "E", pages 21-22.

13. Louisiana Act 751 of 1954. Passage of Act 138 of 1955 had the full support and agreement of the Levee Board and all groups interested in the problem, and was passed by the Louisiana Senate and House of Representatives without a dissenting vote. On the other hand, the tax limitation of Act 756 of 1954 was opposed by the Levee Board from its inception.

and rescinded by a resolution of the Board adopted on June 6, 1955.[14] Since no taxes have been or will be collected under the resolution of November 19, 1954, it would seem obvious that the issues raised by that resolution have become moot.[15]

It is respectfully submitted that the application for certiorari should be denied.

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June, 1955.

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14. See Appendix F.

15. See Original Brief of Intervenors, Stern, et al., p. 4 where counsel state: "It should be pointed out that the Board's resolution relates only to the year 1955. It is necessary, therefore, to consider the issues only in the light of the facts presented for that year." The original plaintiff in the suit below had asked that the resolution be recalled and rescinded.

APPENDIX "A".

OPINION OF THE TRIAL COURT
(Excerpts)

The constitutional amendment of 1954 expressly states that it "shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred." This reservation hardly was necessary and it is simply an express recognition of the obligation implicit in the amendment. That is to say, if any such creditor is unable to satisfy his claim against the Levee Board, he may bring appropriate proceedings to have an additional tax levied up to the previous 5-mill limitation.

This was recognized in State ex rel Marchand v. New Orleans, 37 La. Ann. 13. In that case relator had entered into a contract with the City of New Orleans at a time when the city had a taxing power of 12½ mills. By constitutional revision this power was reduced to 10 mills. Recovering judgment, which remained unsatisfied, relator mandamused the city to assess the additional 2½ mills to provide funds for the liquidation of his judgment. The Court stated the principle applicable to the case as follows:

"Under the consistent jurisprudence of the Supreme Court of the United States and of this Court, *the power of taxation* existing at the time of the contract is read into the contract and *continues to exist, so far as necessary* for the enforcement of the obligations of the con-

tract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation. State ex rel Moore v. City, 32 Ann. 726; State ex rel De Leon v. City, 34 Ann. 477; State ex rel Carnere v. City, 36 Ann. 687; Von Hoffman v. Quincy, 4 Wall. 535 (18 L. Ed. 403); Wolff v. New Orleans, 103 U. S. 358 (26 L. Ed. 395); Nelson v. St. Martin, 111 U. S. 720 (4 Sup. Ct. 648, 28 L. Ed. 574).

The Court thereupon disposed of the matter by saying:

"From the foregoing statement, it appears that, *to the extent necessary for the provision for payment of plaintiff's judgment*, the city possesses a residuary power of taxation of two and one-half mills. . . ."

So, here, as in the *Marchand* case, there is a residuary power of taxation of 1½ mills. In the absence of other funds to satisfy any of its unpaid matured obligations, the Levee Board may voluntarily, or by mandamus, be forced to, assess the additional tax. That situation does not exist in this case and there is no necessity therefor.

Petitioners' brief herein, pages 46-47:

* * * * * *

. . . The Board seeks to project an anticipated deficit of $537,183.00 (Exhibit D-9) from its expenditures and proposed new construction work for 1955 if its tax is limited to 3½ mills. This suggested deficit simply results from an unrealistic construction program for 1955.

Petitioners' brief herein, page 50.

APPENDIX "B".

ORIGINAL BRIEF OF INTERVENORS, EDGAR STERN, ET AL., (PETITIONERS HEREIN).

(Excerpts)

Thus as heretofore pointed out, the constitutional amendment expressly states that it "shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred." This reservation hardly was necessary, and it is simply an express recognition of the obligation implicit in the amendment. That is to say, if any such creditor is unable to satisfy his claim against the Levee Board, he may bring appropriate proceedings to have an additional tax levied up to the previous 5-mill limitation.

This was recognized in *State ex rel Marchand v. New Orleans*, 37 La. Ann. 13 (1885). In that case relator had entered into a contract with the City of New Orleans at a time when the city had a taxing power of 12½ mills. By constitutional revision this power was reduced to 10 mills. Recovering judgment, which remained unsatisfied, relator mandamused the city to assess the additional 2½ mills to provide funds for the liquidation of his judgment. The court simply and clearly stated the principle applicable to the case as follows:

> "Under the consistent jurisprudence of the Supreme Court of the United States and of this court, *the power of taxation* existing at the time of the contract is read into the contract and *continues*

to exist, so far as necessary for the enforcement of the obligations of the contract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation (citing the Moore, Van Hoffman, Wolff and Nelson cases cited by the Board and Mr. Roussel)."

The court thereupon disposed of the matter by saying:

"From the foregoing statement, it appears that, *to the extent necessary for the provision for payment of plaintiff's judgment*, the city possesses a residuary power of taxation of two and one-half mills. . . ."

So, here, as in the *Marchand* case, there is a residuary power of taxation of 1½ mills. In the absence of other funds to satisfy any of its unpaid matured obligations, the Levee Board may voluntarily, or by mandamus be forced to, assess the additional tax. As shall now be shown, however, there will be no necessity for any such action with respect to the year 1955, which is the only year involved in the instant case.

Original brief of intervenors, Stern, et al., pages 16-18.

* * * * * *

. . . The Board seeks to project an anticipated deficit of $537,183 from its expenditures and proposed new construction work for 1955 if its tax is limited to 3½ mills. This suggested deficit simply results from an unjustified construction program for 1955.

Original brief of intervenors, Stern, et al., page 22.

APPENDIX "C".

ORIGINAL OPINION AND DECREE OF THE SUPREME COURT OF LOUISIANA. (Excerpts).

The constitutional amendment adopted pursuant to Act 756 of 1954, amending Section 2 of Article 16 of the Constitution of 1921 does not limit the taxing power of the Levee Board for all purposes to 3½ mills. The amendment from its clear and unambiguous language cannot be so construed. The amendment reads as follows:

> Section 2. For the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, the governing authority of each district, with the exception of the Board of Levee Commissioners of the Orleans Levee District, may levy annually a tax not to exceed five (5) mills on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, as may levy annually for the years 1955, 1956, 1957, 1958 and 1959 a tax not to exceed three and one-half (3½) mills, and annually thereafter a tax not to exceed two (2) mills, on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow. Should the necessity arise in any levee district to raise additional funds for such purposes, the said tax may be in-

creased when the rate of such increase and the necessity therefor shall have been submitted to and voted for at an election called for that purpose by a majority in number and value of the property taxpayers of said district qualified to vote and voting at such election. Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred."

Since there is no ambiguity in the language used in this amendment, we must abide by the intent and purposes expressed therein. The provision limiting the taxing power of the Levee Board "for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto" merely limits the taxing power for that purpose and has no reference to outstanding obligations and bonds issued prior to the adoption of this amendment. This provision is prospective and relates to something to be done in the future. No reference is made therein to past obligations. The last provision in the amendment, viz: "Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred" is retrospective and relates to obligations incurred prior to the adoption of the amendment. It protects the rights already acquired by the bondholders. In other words, if the Levee Board is remiss in making provisions for the

payment of the interest on the bonds and the retirement of matured bonds, the bondholders could enforce the taxing power of 5 mills if necessary to meet these obligations. The amendment has a twofold purpose, the construction of levees, etc., and the payment of the Levee Board's outstanding obligations. It is the duty of the Levee Board to carry out these purposes. The interpretation we have placed on this amendment is consonant with the clear and unambiguous language used in the amendment and gives the amendment a constitutional effect rather than to annul it. It is well settled that a law should be construed so as to give it a constitutional effect if possible to do so.

Petitioners' brief herein, pages 22-24.

* * * * * *

. . . The second question posed is whether or not the defendant Board abused its discretion in preparing its budget. The action of the Board is not subject to review unless there has been some palpable abuse.

Petitioners' brief herein, page 24.

* * * * * *

. . . The attack on the budget seems to be leveled principally at the work proposed by the board. We find no evidence in the record that would justify us in saying that the items listed in the budget are not correct or that the work proposed was not necessary. The chief engineer of the Levee Board testified that the work proposed in the budget is necessary and there was no evidence offered to contradict him in this respect. We cannot substitute our judgment as to the feasibility of the work.

APPENDIX "D".

OPINION *PER CURIAM* OF THE SUPREME COURT OF LOUISIANA ON DENIAL OF REHEARING.

(Excerpts)

In their application for rehearing the plaintiff and intervening taxpayers do not raise any questions but those fully considered and answered in the original opinion and in view of our conclusions and the correctness of our opinion we would ordinarily refuse the rehearing without a per curiam but in order to dispel the confusion that stems from the many erroneous statements that have been given widespread publicity we think a few factual observations are pertinent and necessary.

Counsel for the intervening taxpayers states in their brief: "The Court does not question the clear and abundantly supported finding of the lower court that a 3½ mill tax will not only be sufficient to discharge all antecedent bonds and other obligations of the Board maturing in 1955, but will afford a balance of over $2,600,000 for the Board's other operations." This statement is ridiculous because the facts as disclosed by the record show that the 3½ mills will produce only $2,403,792 whereas the outstanding obligations exceed this amount by $1,320,537.

Petitioners' brief herein, pages 30-31.

* * * * * *

. . . The observation of the trial judge that the budget was "unrealistic" might be better applied to his

conclusions rather than to the budget for nowhere in the record is found any basis or support for his conclusions which would not only leave the Board with an insufficient amount of money to pay its outstanding obligations but would leave it without funds to operate, maintain a levee system, and develop the Lakeshore area, from which most of its other revenue is derived, and would in effect abolish the Levee Board. It would leave the bondholders without the necessary machinery set up in the Constitution to collect and retire the bonds.

Petitioners' brief herein, page 32.

APPENDIX "E".

LOUISIANA ACT NO. 138 OF 1955.
(Excerpt).
HOUSE BILL 218.
AN ACT

Proposing an amendment to Section 2 of Article XVI of the Constitution of Louisiana, to provide for the annual levy of taxes by the governing authority of levee districts.

\- - - - - -

(b). The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, may levy, annually, a tax not exceeding five (5) mills on the dollar on all taxable property situated within the alluvial portions of said district subject to overflow, sufficient to pay all the principal, interest and other charges that may mature each year on the bonded indebtedness of said Board outstanding as of May 1, 1955. Said Board may also levy an annual tax on such property for the purpose

of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, including the payment of indebtedness incurred, new bonds issued and refunding bonds issued after May 1, 1955; provided, that the tax levied for such purposes shall be limited to an amount which, together with the tax levied for the payment of principal, interest and other charges on bonded indebtedness of the Board outstanding as of May 1, 1955, will not cause a total levy for the year 1956 and thereafter of more than three (3) mills, notwithstanding anything to the contrary contained in existing statutes of this State. For the purpose of readjusting, extending or unifying the whole or any part of its outstanding bonds, certificates, certificates of indebtedness or any other existing indebtedness (including the obligations of the said Board of Levee Commissioners to the Board of Commissioners of the Port of New Orleans created by the contracts under date of June 29, 1918, February 26, 1919, and November 14, 1919, ratified and confirmed by Article VI, Section 16 of the Louisiana Constitution of 1921), said Board of Levee Commissioners shall have full power and authority to issue negotiable interest-bearing refunding bonds in an amount not exceeding the amount of bonds, certificates of indebtedness and other existing indebtedness to be refunded (including said obligations to the Board of Commissioners of the Port of New Orleans) and the interest due thereon. The refunding bonds herein authorized shall be issued in the manner and subject to the limitations contained in Sections 1 through 8 of Act 733 of the Legislature of Louisiana for the year 1954, and no further legislation shall be necessary to carry this grant of power into effect; and this amendment, upon its adoption, shall be self-operative.

FILED
AUG 1 0 1955
HAROLD B. WILLEY, C

Supreme Court of the United States

October Term, 1955

No. 116

EDGAR B. STERN et al.
Petitioners

versus

THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT et al.
Respondents

PETITIONERS' BRIEF IN REPLY TO THE OPPOSITION OF RESPONDENT THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT

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